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**LIMITING THE USE OF FORCE AMONG NATIONS: PHILOSOPHERS,
LAWYERS, GUNS AND MONEY**

A Thesis Presented to
The Judge Advocate General's School
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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45th JUDGE ADVOCATE OFFICER GRADUATE COURSE
April 1997

LIMITING THE USE OF FORCE AMONG NATIONS: PHILOSOPHERS, LAWYERS, GUNS AND MONEY

Major Daniel J. Lecce, U.S. Marine Corps

THESIS: A basic tenet of jurisprudence is that laws which do not produce justice are little more than empty platitudes. To bolster the binding power of international law limiting the use of armed force among nations, elements of justice should be considered in the law's application and interpretation. Elements of justice include: bilaterality, parity, reciprocity, reparation and requital.

ABSTRACT: The methodology of this study is to explore the elements of justice in international state practice as they evolved from the just war doctrine. Part I explores the development of the just war doctrine and the evolution to positive law and pragmatism after the fall of the Holy Roman Empire in the 17th century. Part II analyzes the preference for law over justice in modern international law. Part III discusses the use of expanded self-defense, to include reprisal, and humanitarian interventions to achieve equalizing justice between nations (in the former case), and between nations and individuals (in the latter case). Part IV discusses the validity and desirability of reintroducing "justice" into modern international jurisprudence.

Modern international law attempts to restrain and regulate the inter-state use of force are based in positive law. These laws are, in large part, encoded in the United Nations (UN) Charter. Positive law requires objectively-discerned criteria applicable to all situations, external governance and enforcement. Although the UN Charter has generally been an effective mechanism for controlling the use of force among nations, its declarations are often contrary to actual state practice. The basis of this paradox lies in the objective standards the UN applies in limiting use of force. The goal of these standards is to maintain peace; however, they often have the practical effect of stripping the law of "justice." Nations, like individuals, will not adhere to laws which are, or perceived to be, devoid of producing justice. Thus, state practice deviates from the law. Given the great importance placed on state sovereignty, this is especially true in cases where a nation's vital or survival interests are concerned.

This study argues that the justice component of international jurisprudence should be renewed and emphasized. Specifically, this study argues that the reparative element of equalizing justice permits an expanded use of force in the following situations: expanded national self-defense, including reprisal, and humanitarian interventions. Equalizing justice seeks requital of harm culpably committed by one nation against another, or, in the case of humanitarian intervention, by a nation against individuals.

LIMITING THE USE OF FORCE AMONG NATIONS: PHILOSOPHERS, LAWYERS, GUNS AND MONEY

PREFACE

This paper embarks upon the study of an extraordinarily broad subject: international jurisprudence applicable in the regulation of the use of force among nations. At the outset, it is important to present the reader with some warnings and guideposts regarding the intent, objective, and methodology utilized in this study.

It is often said that the primary attribute of a legal study is its ability to give a concise statement of the problem and offer logical, succinct solutions. In a manner of speaking, to discern the trees from the forest. The present legal study takes the opposite course. To expand on the analogy, this paper takes the reader into the wilderness. Attempting to cover the history, development and application of international jurisprudence regulating the use of force among nations is a daunting task. Hundreds, perhaps thousands, of volumes have been dedicated to the subject and interrelated topics (e.g. state sovereignty).

Further, this study does not attempt to articulate specific solutions to the problems which face the international community with regard to the regulation of the use of force. It is not the purpose of this paper to offer proposed United Nations resolutions, or draft international conventions that may aid in improving the regulation of the conduct of nations. Rather, a more philosophical approach is taken. This study explores the jurisprudential underpinnings of international law regulating the use of force among nations. To do this one must

determine the type of society international law attempts to regulate, the logical limitations of such law, and the mechanism utilized to enforce the law.

The rationale for the resort to the use of force among nations is as much a symptom of the type of society international law attempts to regulate, as it is a necessary form of self-defense. Before the law can be modified, a proper understanding of the needs of the international society must be understood as well as the limitations of the power of law in that society.

Recognizing the expanse of the subject, the pages that follow provide a basic framework, attempting to guide the reader through the history of the just war doctrine, its demise, and the development of international jurisprudence in the modern era. The intent of this paper is to provide this framework in a logical and understandable fashion.

The object of this study is to develop a basis that allows for the suggestion that elements of justice: reparation, reciprocity, parity, and retribution have a place in contemporary international jurisprudence. This is especially true when addressing law regulating the use of force among nations.

A paradox exists in the modern positivist's dismissal of justice as nebulous concept inappropriate for the regulation of conduct between and among nations. This paradox is reflected in consideration of the universally accepted premise that the purpose of any law should be the attainment of justice. The proper end of any effective law is justice. Naturally, nations, like individual men, will not voluntarily adhere to laws perceived to be devoid of justice.

The methodology of this paper is to address international jurisprudence in four parts: first, the development of the just war doctrine; second, the preference in modern international law

for peace over justice; third, the application of justice in modern international jurisprudence, and; fourth, the vitality of the concept of justice in modern international jurisprudence.

This study does not presume to exhaust the analysis of law and justice in international jurisprudence. To the contrary, these subjects are rather cursorily examined in the context of the proper application of each within the law limiting the use of force among nations. Nor does this study make affirmative claim to achieving the proper methodology for examining issues regarding the inter-state use of force. It is the hope, however, that the conclusions of this study will be considered as an alternative, and perhaps better, way of thinking about, and addressing these issues.

In addressing the development of the just war doctrine, the actual text of the various classical philosophers and jurists were not consulted in detail. Instead, the writings of a number of highly-qualified and regarded experts in the field were relied upon. These sources include: Arthur Nussbaum, *Just War-A Legal Concept?*, 42 MICH. L. REV. 454, (1943); Edwin DeWitt Dickinson, *The Equality of States in International Law* (1920); Joachim von Elbe, *The Evolution of the Concept of Just War in International Law*, 33 AM. J. INT'L L. 665 (1939); James Turner Johnson's, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200-1740* (1975), and *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (1981); Joseph C. McKenna, *Ethics and War: A Catholic View*, 54 AM. POL. SCI. REV. 647 (1960), and; *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Onuma Yasuaki, ed. 1993).

In addressing modern international law and regulation of the use of force among nations the following sources were utilized extensively: Yoram Dinstien, *War, Aggression and Self-Defense* (1994), and; Goodrich & Hambro, *Charter of the United Nations: Commentary and*

Documents (1949), were relied upon heavily. In presenting a definition of law, Georg Schwarzenberger, *The Three Types of Law*, 53 ETHICS 89 (1943) was used almost exclusively. J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (1963) was relied upon in defining the law regarding state sovereignty. The study of justice was derived from Giorgio Del Vecchio, *Justice: An Historical and Philosophical Essay* (A.H. Campbell ed., 1952).

Finally, Colbert Evelyn Speyer Colbert, *Retaliation in International Law* (1948), and; Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA. L. REV. 933 (1986) were used extensively in discussing international law regarding reprisal.

D.J. LECCE

Charlottesville
April 1997

**LIMITING THE USE OF FORCE AMONG NATIONS: PHILOSOPHERS,
LAWYERS, GUNS AND MONEY**

MAJOR DANIEL J. LECCE*

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INTRODUCTION

Most historians and international theorists would agree that armed conflict between men of different societies, whether it be based on tribe, religion or nation, has been a constant throughout the history of civilization. As Professor Dinstien noted:

“War has plagued *homo sapiens* since the dawn of recorded history and, at almost any particular moment in the annals of the species, it appears to be raging in at least a portion of the globe (frequently, in many places at one time and at the same time).”¹

Man’s propensity toward war and conflict has led to numerous attempts to regulate and restrict such violent struggle. The study of modern limitations on the use of force among nations often ends in frustration or confusion because the mandate of modern international law is not always consistent with actual state practice. Article 2(4) of the United Nations Charter articulates the familiar blanket prohibition against the use of armed force among

¹ YORAM DINSTIEN, WAR, AGGRESSION AND SELF-DEFENSE, at xvii (1994).

nations, except in cases of self-defense or Security-Council authorized collective action. The practice of nations, however, since the inception of the Charter in 1945 often does not reflect the Charter's mandate.

For the casual observer of international relations, this apparent disregard for the law of the Charter would lead one to believe that international law is nothing more than a set of empty declarations made by an international organization with little power to enforce them.

Sovereigns will comply with international law if the law suits their purpose, but otherwise the law may be disregarded.

For lawyers and international theorists, international law is often viewed as a nebulous form of positive law that sometimes lacks the support of the very community it seeks to regulate. This view of international law grows from three, sometimes misplaced, observations. First, even if most nations agree on a rule of law, such as the blanket prohibition on the use of force, international law suffers from the absence of an effective enforcement authority. Second, international law is often manipulated by States to rationalize actions that violate, if not the letter of the law, the spirit of the law. Finally, many disputes and actions between nations do not lend themselves to regulation by law. In other words, actions between and among nations are often non-justiciable. Nations will always act in their own best interests regardless of the restrictions laid down by international law.

This study seeks to better define and understand international law regarding limitations on the inter-state use of force. The subject will be addressed in four parts. First, the evolution, development and demise of the just war doctrine and its impact on modern international law will be discussed. Second, the preference for, and desirability of, peace over justice in contemporary international law will be addressed. Third, the efficacy of the application of

justice in the regulation of force among nations will be discussed. Fourth, the value of justice as a component to a normative approach to international law will be argued.

OVERVIEW

The Part I of this study will address the just war doctrine as it developed from ancient Roman times to the eighteenth century. The conversion of Constantine of Great to Christianity in 337 A.D. would move St. Augustine to develop a moral-religious doctrine requiring the origin of war to be approved by God, and the means of warfare limited in accordance with Christian notions of civility and charity. Augustine would begin a doctrine of just war with a basis in Christian theology that would continue into the seventeenth century.

St. Thomas Aquinas would be the first to take the moral and religious teachings of Augustine and systematize just war doctrine. Writing in the thirteenth century, Aquinas would establish the three conditions for just war that would expanded and refined in the centuries to follow. A war could be waged only if: first, the prince had the proper authority from the state to do so (*actoritas principis*); second a just cause for war existed (*justa causa*); and, third the sovereign had the proper intention to promote good and fight evil (*recta intentio*). This became known as the Thomist doctrine.

The Hundred Years' War (1337-1453) illustrates application of the just war doctrine at the close of the Middle Ages. Through the Middle Ages and up to the 19th century, the bulk of the *jus gentium*, or law of nations, was made up on the law regulating warfare. During the Middle Ages, the limitations on war between nations was set down by the notion of *bellum justum*², or just war. Although the conduct of men in battle was regulated through the

² This study will use the terms "*bellum justum*" (just war) and "*jus ad bellum*" (justice in war) interchangeably.

chivalric code and *jus armorum* (just combat), the three just war criteria of proper authority to declare war, just cause for war and just intentions in war controlled relations among nations.

The Thirty Years' War (1618-1648) had a significant impact on the development of the modern notion of absolute sovereignty. Prior to the Thirty Years' War, sovereign nations were not known as they are in contemporary times. There was no national feeling among subjects of a State. The feudal system indentured peasants to their vassal overlords.

By the seventeenth century, the feudal system was in decline. Indentured rabble armies gave way to professional standing armies. The Reformation that was the catalyst of the Thirty Years' War would deeply divide Europe along religious and political lines. By the end of the Thirty Years' War, Europe broke from the near-total secular and religious control of the Holy Roman Empire. A new era of absolute sovereignty of nations began.

With this new era of independent and equal states, the *jus ad bellum* also underwent modifications that would secularize the doctrine. Specifically, naturalist theorists, Hugo Grotius being the perhaps best known, based their doctrines on natural law, which could be derived through right reason. Thus the requirement for divine approval of war was replaced by a more legalistic approach.

Naturalist theorists revolutionized just war by secularizing the doctrine: replacing divine approval with right reason deduced from nature. In the seventeenth century, Thomas Hobbes greatly impacted Naturalist theory by introducing the notion of absolute equality among men and nations, leading each to constantly struggle for self-preservation. In short, the natural state of man was one of conflict and the natural state of nations was one of war. It is only through social contract that men and nations can live together without constant conflict.

By the beginning of the eighteenth century the just war doctrine was almost completely rejected as being overly subjective and inappropriate for regulating relations among nations and lacking any means of enforcement. From these objections to the just war doctrine, the Positivist approach to war took hold. Positivists exclusively concern themselves with international customs and treaties and reject any notion of justice as appropriate for the regulation of international relations.

The extreme positivist approach introduced Machiavellian notions of realism and pragmatism into international relations. According to Pragmatists, political expediency and military power take precedence over fanciful notions of civility or charity. The value of a nation in international society is based on the quality of its army.

Part II will discuss the premium placed on law over justice in modern international relations, specifically regarding limitations on the use of force. The Napoleonic Wars brought what the Prussian military theorist Clausewitz termed “total war” to the world for the first time.

By the end of the nineteenth century, international statesmen and jurists began to detail written rules for warfare. The carnage produced by two world wars and advances in weaponry provided the fuel for encoding customary rules restricting warfare.

At the end of World War I, the victorious Allies sought to essentially outlaw war through the Covenant of the League of Nations. The League failed to achieve this end due to inherent definitional and procedural weaknesses. The Covenant was revolutionary, however, as it marked the first attempt to establish a world community since the decline of the Holy Roman Empire after the Thirty Years’ War.

The United Nations Charter sought to remedy the shortcomings of the Covenant and establish a viable world community possessing necessary oversight powers. The heart of the

UN Charter is Article 2(4), which prohibits “the threat or use of force” against the sovereignty of another nation in a “manner inconsistent with the Purposes of the United Nations.” The Charter only permits the use of force, more specifically, the use of armed force, in self-defense, under Article 51, or pursuant to a Security-Council approved collective enforcement action under Chapter VII of the Charter.

Legislating against the use of force among nations and implementing such law are two different things. The issue of defining international law and its limitations will be discussed. International theorist Georg Schwarzenberger notes that the “society of nations” international law attempts to regulate is very different than the “community of individuals” domestic law regulates. Therefore attempts to use domestic law as the standard by which to judge the effectiveness of international law are misguided. International law is based on relationships giving primacy to power and reciprocity, than that of domestic law which governs a community possessing an unified sense of co-ordination.

Part III of this study will discuss the history of, and basis for, the customary use of self-help among nations. National self-help includes the notion of self-defense as defined in Article 51 of the Charter, but it also includes an expanded definition of self-defense that allows for reprisals and humanitarian interventions.

Reprisals encompass the just war notion of “vindictive justice.” In other words, action taken to correct a past wrong.

Just as reprisal re-introduces notions of justice, so too does the use of humanitarian interventions. Whereas the use of reprisal is an expanded form of self-defense among nations, humanitarian intervention is a form of self-defense protect individuals. Perhaps the greatest difference between these two forms of self-defense is that the former has been rejected by the United Nations community as a whole, while the latter has been embraced.

Part IV of this study will discuss the viability of the continuing application of just war concepts to modern day international relations. It may be argued that the primary objective of placing law over justice is to achieve objective standards for implementing regulations over nations. Laws do away with the subjective standards and relative interpretations that “justice” often brings. This ignores, however, the fact that nations, similar to individuals, will not freely submit to laws that do not, in the end, achieve justice. It is this “laws without justice” paradox that makes certain uses of force in international law non-justiciable.

Perhaps the strongest argument that led to the demise of the just war doctrine in the eighteenth and nineteenth centuries, was the absence of an effective arbiter and enforcer of justice. This argument loses some force when justice may be fettered out within the legislative rubric of the United Nations and the interpretive power of the International Court of Justice. Instead of operating under fiction that the expanded definition of self-defense, to include reprisals, falls outside the confines of the law, recognize reprisal, if used properly, as a viable means of obtaining justice.

Under customary law, reprisals could not be used exclusively to punish another nation, and they could never be used to further attempts of territorial expansion. Reprisals could, however, be used by a nation to rectify a continuing wrong, where demands for resolution have been left unsatisfied and where the traditional limiting factors of necessity, proportionality and immediacy are applied. Nations who feel they are subject to unjustified reprisal may submit their dispute to the Security Council or the ICJ.

Similarly, regarding humanitarian interventions, where citizens of a nation are systematically and ruthlessly aggrieved by a despotic ruler, or where persons are persecuted due to their race, culture, creed or religion, traditional notions of “justice” require steps be taken “to make right the wrong committed.” Further, the incidence of nationals abroad being

persecuted or held hostage by their host nation should allow for armed action by the aggrieved state if necessary.

Critics of this expanded approach to self-defense argue that the absolute sovereignty of nations does not allow breaches of peace through use of reprisal or humanitarian intervention. This criticism fails for two reasons. First, the peace has already been broken by the offending state that commits unwarranted acts of aggression against another nation, or atrocities against individuals. Second, the establishment and acceptance of a world community under the United Nations necessarily requires the relinquishment of a certain measure of national sovereignty to ensure the fair and equal treatment of all. It has been said that sovereignty is not a "sacred cow." Sovereignty, like all other components of the international law has its limits. These limits should be determined by notions of shared justice, to include the just war notions of humanity, civility and charity.

Perhaps the greatest criticism of interjecting justice into modern international law is the Machiavellian argument that "justice" will be determined only by those who hold the power. This argument simply fails to acknowledge actual state practice. Until an international community in the strictest sense of the word (including shared morals, goals, culture, and religion) is established, nations will always pursue their best national interest primarily, and seek the advancement of other nations secondarily. This does not mean, however, powerful nations will run roughshod over the weak (as often occurred in the 19th and early 20th centuries).

The governance of nations over the past half-century under the United Nations Charter has imbued all with an acute sense of the "law of nations." It is highly unlikely that acts of territorial aggrandizement parading under the guise of lawful reprisal or humanitarian

intervention will be accepted by the world community. The demise of Iraq's attempt in the 1990's at self-help to regain "lost territory" is a case in point.

By interjecting shared notions of justice (e.g. righting a past wrong, stopping the systematic terrorization of individuals) into the international community, the law of nations will gain credibility and make justiciable those claims between nations that have, since the inception of the Charter, remained outside of the color of the law.

I. EVOLUTION OF THE JUST WAR DOCTRINE

Schools of legal philosophy are divided somewhat arbitrarily and do not always offer sufficient explanation for the differences of the writers in the varying schools. Further, "... modern authorities are not always agreed as to the school to which certain of the classical publicists should be accredited."³

In its purity the doctrine of just war is a wholly ethical one. This derives from the fact that morality, ethics, law and religion were bound up in ancient and pre-modern theory.

It is by no means easy to distinguish between law and morality or religion in many pre-modern cultures, and in ancient cultures is generally impossible to do so. The codes of Hammurabi and Moses were simultaneously social and religious, and they were law; no distinction was made in them between the religious and legal. Indeed, even in the case of Western just war doctrine, to distinguish the between religious, moral, or philosophical and the legal components would be extremely misleading about the nature of that doctrine and the relation of the various value-formative sources that contributed to it. . . When conquest spread the hegemony of a given culture, its moral and religious claims spread with it; they became binding on the conquered people as a part of the overlordship of the new masters.⁴

³ EDWIN DEWITT DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW 68-69 (1920).

⁴ JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY 42 (1981) [hereinafter JOHNSON, JUST WAR TRADITION].

Just war doctrine is not a static theory. It evolved over centuries of religious and cultural change. Although the primary influence on the doctrine is the hegemony of Christendom through the Middle Ages, just war doctrine was developed though an amalgam of legal traditions. Just war doctrine "came into being as a result of interaction between several secular and religious sources, and its classic form it expressed the community law of Christendom not only on war but upon politics and the use of force generally."⁵

By the end of the medieval period, the just war doctrine had evolved significantly from its Christian beginnings as first described by St. Augustine in the fourth century:

The just war doctrine bequeathed by the late Middle Ages to the modern period was an amalgam of elements supported by two quite distinct rationales: the theological, derived principally from Augustine through Thomas Aquinas and the canon law; and the legal, drawn from Roman law, the chivalric code, and common practice among men.⁶

The next section will proceed to briefly explain the development the just war doctrine over time. Illustration of the application of the just war doctrine will be made through discussion of the Hundred Years' War and the Thirty Years' War.

A. ANCIENT THEORIES

Just War concepts have their roots in ancient Greek philosophy. Aristotle believed that all people should submit to the sage Philosopher King. Nature dictates that all others should be governed. War is the means to assert the will of the King over those who are destined to governed, but will not submit.

⁵ *Id.* at 88. "Thus the medieval Church did not simply exert its will over Christendom; it came to terms with chivalric tradition and with Roman, Germanic, and other legal traditions." *Id.* at 79.

⁶ JAMES TURNER JOHNSON, IDEOLOGY, REASON, AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS, 1200-1740, at 150 (1975) [hereinafter JOHNSON, IDEOLOGY].

With the rise of the ancient Roman Empire, the first rough just war philosophy could be seen. "To the Romans, a war was just only if it was preceded by a solemn action taken by the *collegium fetialium*, a corporation of special priests, the *fetiales*."⁷ "The *fetiales* were a college of priests charged with a number of duties, some of which pertained to the inception of war."⁸ If a foreign nation violated its obligation toward Rome, a delegate of *fetiales* would convene to determine whether the claim against the offending nation was just.

Recourse to arms could only be undertaken for an injury suffered and after the refusal of the violating state to pay reparations.⁹ If the cause of action was found to be just by the *fetiales*, they would certify the cause to the senate for the ultimate decisions to commence hostilities.¹⁰ Thus, the ultimate decision to wage war lay with the senate and the Roman people. Although crude, the Romans first enunciated technical legal criteria to engage in war.¹¹

B. THE SCHOLASTICS

The Scholastic doctrine of just war began with Augustine's attempts to reconcile traditional Christian notions of pacifism and charity, with the need of the Holy Roman

⁷ Arthur Nussbaum, *Just War-A Legal Concept?*, 42 MICH. L. REV. 454, 454 (1943).

⁸ DINSTIEN, *supra*, note 1, at 61.

⁹ Joachim von Elbe, *The Evolution of the Concept of Just War in International Law*, 33 AM. J. INT'L L. 665, 666 (1939).

¹⁰ Two procedural conditions were required to be met before the outbreak of hostilities. First, satisfaction of the Roman grievance had to be demanded. A fixed period of time was given for such satisfaction to be met. Second, if satisfaction of Roman demands were not forthcoming, a formal declaration of war had to be made and approved by the senate. see DINSTIEN *supra*, note 1 at 61-62.

¹¹ For the Romans, *bellum justum* (just war) equated to *bellum pium* (pious war). Nussbaum, *supra* note 7, at 454.

Empire to protect its interests. In the 5th century, Augustine enunciated the concept of a just war waged only to avenge wrongs and to obtain peace. From this beginning the Scholastic theory of just war was expanded and detailed by theologians such as St. Thomas Aquinas. After the Reformation, the Neo-Scholastics such as Suarez would further refine just war theory to be more compatible with the changing political and religious landscape of the Western world.

1. AUGUSTINE

Constantine the Great's¹² conversion to Christianity in 337, brought about a broadening of the just war doctrine. Up to the time of Constantine, Christian doctrine had been one of pacifism.¹³ But with the acquisition of an Empire, the Christian pacifist tradition had to be modified to allow for the defense of its kingdom on Earth. Thus evolved the criteria of permission and limitation "whereby the origin of war had to be approved by God and the means of waging war were severely limited."¹⁴

¹² Constantine was the emperor of Rome from 324-337 A.D.

¹³ Despite an apparent reluctance to enter the army, early Christians did serve, and some achieved distinction. The feeling among them that service was incompatible with new religious spirit hinged not on the martial purposed of the soldier's profession but on the idolatrous rites often associated with military life. Joseph C. McKenna, *Ethics and War: A Catholic View*, 54 AM. POL. SCI. REV. 647, 649 (1960). Tertullian, a North African church father who wrote about 200 A.D. wrote the treatise "On Idolatry." In this treatise, Tertullian considered the suitability of may occupations for the Christian. "He rejected woodworking, silver and goldsmithing, the life of study, that of a teacher, civil government service ,and . . . military service all for the same reason: all are inherently idolatrous." JOHNSON, JUST WAR TRADITION, *supra* note 4, at xxvii.

Up to the time of Constantine, the Christian church worked to stay separate from the resort of society following Jesus' admonition to "render to Caesar that which is Caesar's, and to God that which is God's" (MATTHEW 22:21), and "whose earliest expression can be found in Paul's advice to Christians to keep themselves separate from the world . . ." *Id.* at xxviii.

¹⁴ Guy B. Roberts, Note, *Judaic Sources of and Views on the Laws of War*, 37 NAVAL L. REV. 221, 223 (1988).

St. Augustine (354-430)¹⁵ in his *De Civitate Dei* (City of God) approved Christian participation in war and the military profession, but required that war be just. Augustine insisted that war should only be used as a means to obtain peace. War could only be justly waged to avenge wrongs suffered at the hands of another sovereign. Thus Augustine opined:

“War may be justly waged . . . for the avenging of injuries suffered—when one must vanquish by armed forces a city or a nation which is unwilling to punish a bad action of its citizens, or which refuses to restore what has been unjustly taken; yet never ought a war to be begun out of a craving for power or revenge.”¹⁶

Just wars must always be preceded by an injury.¹⁷ Those waged for territorial aggrandizement are forbidden.

2. THOMAS AQUINAS

Augustine did not lay down legal rules for just war, but religious and philosophical ideals. Although Augustine’s just war was completely tied to religion and did not purport to establish legal tenets, it had ramifications in the legal area. St. Thomas Aquinas (1225-1274) expanded on Augustine’s just war premise and systematized the Christian doctrine of just war in his *Summa Theologiae*. Aquinas believed that it was not a sin to wage war if certain conditions were satisfied. First, the prince declaring war has the proper authority to do so as the responsible leader of a nation, not as a private individual (*actoritas principis*); second,

¹⁵ Augustine was born Aurelius Augustinus. For the early part of his life he taught rhetoric in Carthage and Milan. About 391 Augustine became a priest in the church of Hippo. “St. Augustine is generally held to be the greatest doctor of Christianity. Of his ninety-six works the greater part are held as authoritative by all the Christian churches; certain, like Confessions and City of God are known to all educated people.” OMER ENGLEBERT, THE LIVES OF THE SAINTS 328-329 (1994).

¹⁶ Nussbaum, *supra* note 7, at 455.

¹⁷ Just are those “*quae ulciscuntur injurias*,”—those waged to redress a wrong suffered. von Elbe, *supra* note 9, at 668.

there is a just cause (*justa causa*) for war, to wit: the adverse party deserves to be fought against because of some guilt of his own, and; third, the belligerents are motivated by the intentions to promote good and avoid evil (*recta intentio*).¹⁸

These three criteria would become the center of Christian or Scholastic doctrine of just war. Of the three criteria, the *justa causa* is the core of the doctrine. Just as Augustine condemned wars of aggrandizement, so Aquinas required some wrong to have been committed by the sovereign to be fought, before war could be just. But Aquinas went further than Augustine. Where Augustine required only a wrong suffered as the just cause for war, Aquinas required culpability on the part of the offending nation before resorting to war.¹⁹ This would become known as the *Thomist doctrine* of just war.

It is important to note that Aquinas' concept of Just War is defensive in nature. By requiring some culpability on the part of the offending nation before resorting to war, Aquinas forbade offensive wars. This concept of just war is in keeping with the writers of the canonical tradition who preceded Aquinas.²⁰ The notable exception to defensive nature of the Scholastic just war concept is the Holy War.²¹

¹⁸ Nussbaum, *supra* note 7, at 456. Aquinas believed that these criteria could be known quite apart from divine revelation through the use of human reason. Thus, the roots of naturalist theories also derive from Thomists thought. See JOHNSON, JUST WAR TRADITION *supra* note 4, at 76.

¹⁹ von Elbe, *supra* note 9, at 669.

²⁰ The emphasis on defense of one's own rights, implying assertion of them if denied; protection of one's own property, implying regaining it or just payment for it if unlawfully seized; and punishment of wrongdoing if the other nation has taken no steps to exact punishment of its own. The issues of commanded war and offensive war are left aside, with the exception that some of the above types of wars might seem to be offensive if the antecedent wrong done were not known to the observer. Actual wrong must have been done, moreover; it is not enough for evil intentions to have existed. Preemptive redress of wrongs or punishment of sin (which to the medieval mind was an instance of redress of wrongs) is ruled out. JOHNSON, IDEOLOGY, *supra* note 6, at 38.

From the time of Thomas Aquinas, just war theory began to evolve from a completely religious/moral concept to one more secular in nature. Further, just war theory began to grow from a moral concept to one of law among nations:

.... four separate streams of thought and practice gradually intermingled throughout the late medieval period to form the classic just war doctrine. Two of these sources originated within the Church: the canon law tradition . . .; and the theological tradition, to which Thomas Aquinas made an important contribution but which was by no means limited to his work (both

²¹ The Crusades are an example of a Holy War commissioned by God through the Holy Pontiff. The Holy War has four distinguishing marks: "(1) a holy cause, (2) God's direction and help, (3) godly crusaders and ungodly enemies, and (4) unsparing prosecution." *Id.* at 10 (citing ROLAND BAINTON, CHRISTIAN ATTITUDES TOWARD WAR AND PEACE 148 (1960)).

The Christian biblical authority for holy war may be found in the Book of Samuel: "Samuel said to Saul: "It was I the Lord sent to anoint you king over his people Israel. Now, therefore, listen to the message of the Lord. This is what the Lord of hosts has to say: 'I will punish what Amalek did to Israel when he barred his way as he was coming up from Egypt. Go, now, attack Amalek, and deal with him and all that he has under the ban. Do not spare him, but kill men and women, children and infants, oxen and sheep, camels and asses.'" 1 SAMUEL 15: 1-4, THE NEW AMERICAN BIBLE 256 (1987). When Samuel discovered that Saul had spared Agag, king of the Amalek and the best Amalek sheep and oxen instead of slaughtering them, Samuel reproached Saul: "The Lord anointed you king of Israel and sent you on a mission, saying, 'Go and put the sinful Amalekites under the ban of destruction. Fight against them until you have exterminated them.' Why then have you disobeyed the Lord? You have pounced on the spoil, thus displeasing the Lord." 1 SAMUEL 15: 17-20, *Id.* at 257.

The notion of holy war survives in contemporary times primarily among fundamentalist Islamic sects. The "jihad" and "fatwa" are believed to be calls by God for vindictive justice and retribution. The Iranian government is offering a \$2.5 million bounty on Salman Rushdie, author of *The Satanic Verses*. The Iranian government has said that Rushdie's death sentence is a purely religious matter and that it has no power to retract or modify it. See, THE WASHINGTON POST, Feb 13, 1997, at A32 and Feb 15, 1997, at A27. Another example is the recent public execution of Afghanistan's secular president, Najibullah, and his brother, by the fundamentalist mujahideen sect, Taliban. See, Denis Johnson, ESQUIRE MAGAZINE, April 1997, at 64-68.

Although fundamentalist Islamic sects provide contemporary examples of the invocation of holy war, it would be inaccurate to state that the jihad as conceived by early Islam scholars justifies unbridled war in the name of Allah. To the contrary, original conceptions of the jihad urged restraint and tolerance. It has been noted that "... the jihad, a duty prescribed by Religion and Law, was surely as pious and just as pium and justum in the way described by St. Augustine and St. Thomas and later by Hugo Grotius." MAJID KHADDURI, THE ISLAMIC CONCEPTION OF JUSTICE 165 (1984).

ecclesiastical sources drew upon Biblical and Christian materials). To these two specifically religious sources must be added two secular streams of thought and practice: first, the renewed work of civil lawyers to understand and bring up to date the concepts and legislation of Roman law²² (drew from Roman imperial political and military theory and practice); second, the somewhat inchoate but widely influential code of conduct for the knightly class, the chivalric code. (drawing on contemporary religious and cultural ideals and the older Germanic traditions on warfare, manliness, and the ideal of a solider).²³

The Hundred Years' War illustrates well the application of the just war doctrine. This war was based on England's claim to the French throne and protection of English vassal lands in France. Of specific note, is Henry V's invasion of France during the second period of the Hundred Years' War. Henry needed to gain approval from the Archbishop of Canterbury before he embarked on his invasion of France. Such approval fulfilled the just war requirements that Henry possessed just cause and just intent against France. Further, gaining ecclesiastical approval had the practical effect of easing the burden of raising a large army. If the common man knew God was on his side, he would be more willing to fight for his sovereign.

3. THE HUNDRED YEARS' WAR

"God doth know how many now in health/Shall drop their blood in approbation/Of your reverence shall incite us to do."

HENRY V
-Shakespeare

The Hundred Years' War (1337-1453) pitted the royal houses of England against France. The War was executed in two phases, separated by an uneasy truce. The first phase (The

²² See generally, David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli Ac Pacis*, 10 EMORY INT'L L. REV. 1 (1996).

²³ JOHNSON, JUST WAR TRADITION *supra* note 4, at 122-123 (original citation omitted) (citation and parenthetical added).

Sluys Period 1337-1343) was marked by the successful military campaigns and raids led by King Edward III of England and his son, Edward, the Prince of Wales, known in France as the "Black Prince." The catalyst for the English is based in part on Edward's claim to the French throne through the daughter of the French King Philip IV²⁴, and in part on the Feudal relationship²⁵ of the kings of France and of England.²⁶ As dukes and barons of French lands, the Kings of England were vassals to the French sovereign.²⁷

²⁴ The claim derived from Isabel, the mother of Edward III. Isabel was the daughter of French King Philip IV and the wife of Edward II.

²⁵ The feudal system evolved between 800-900 AD in response to Viking and Moslem raiding on the weakened Roman Empire. The feudal system was based on a series of obligations that emanated from the sovereign prince (who derived his power from the God, via the Catholic pontiff), to his vassals, who were given land in exchange for protection, and ended with the peasant farmers, who were indentured to the Prince's vassals. Generally, the prince stood at the head of his army, which was lead by knights, the fighting aristocracy, who were in turn supported by squires and grooms and peasant foot soldiers. Individual allegiance in feudal times was not owed to the sovereign, but the individual vassals. Thus there was no "national feeling" as we know it today. HOFFMAN NICKERSON, CAN WE LIMIT WAR? 61-64 (1973).

The military organization of the middle ages formed an integral part of the medieval world, and declined when the medieval social structure disintegrated. Spiritually as well as economically the knight was a characteristic product of the Middle Ages. In a society in which God was envisaged as the head of the hierarchy, all secular activity had been given religious meaning. The particular task of chivalry was to protect and defend the people of the country; in waging war the knight served God. He placed his military services at the disposal of his overlord, to whom the supervision of secular activities was entrusted by the church. Apart from its spiritual-religious side, however, the military bond between vassal and overlord also had its legal and economic aspects. The knight's land, the fief, was given to him by the overlord, and in accepting it, the knight assumed the obligation of military service to the overlord in wartime. It was an exchange of goods against services as was fitting to the agricultural structure and manorial system of the Middle Ages. Felix Gilbert, *Machiavelli: The Renaissance of the Art of War*, in MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 11, 12-13 (Peter Paret et. al. eds., 1986) [hereinafter Paret, MODERN STRATEGY].

A religious concept of war as an act of rendering justice, the restriction of military service to the class of landholding knights and their retainers, and a moral-legal code which operated as the main bond holding the army together-these are the factors that determined the forms of

military organization as well as the methods of war in the Middle Ages. The medieval army could be assembled only when a definite issue had arisen; it was ordered out for the purposes of a definite campaign and could be kept together only as long as this campaign lasted. The purely temporary character of military service as well as the equality of standing of the noble fighters made strict discipline difficult if not impossible. A battle frequently developed into fights between individual knights, and the outcome of such single combats between the leaders was decisive. Because warfare represented the fulfillment of a religious and moral duty, there was a strong inclination to conduct war and battles according to fixed rules and a settled code. See generally, *Id.* 11-13.

Knights fought not for the state, but out of their Christian obligation under chivalric law (derived through the knight's overlord). "Though he took up arms in a public quarrel, a soldier still fought as an individual, and rights were acquired by and against him personally, and not against the side for which he fought. Every knight supplied his own equipment, at his own risk, although his horses lost in action were sometimes replaced by his lord. But a knight supported his own squires, grooms, and other servants, and if captured, arranged for his own release and paid his own ransom. . . . he fought because his honor as a knight obligated him to fight, because his lord required his service, and because the profits of successful war might, with luck, make it worth his while to do so. He fought, however, on his own. He did not fight as a salaried servant of the public interest. Robert C. Stacy, *The Age of Chivalry*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 27, 31 (Michael Howard et al. eds., 1994) [hereinafter Howard, THE LAWS OF WAR].

²⁶ R. EARNST DUPUY & TREVOR DUPUY, THE ENCYCLOPEDIA OF MILITARY HISTORY: FROM 3500 B.C. TO THE PRESENT 353 (1986) [hereinafter DUPUY & DUPUY].

²⁷ When the French king Philip VI announced the forfeiture of certain English fiefs in 1337, Edward invaded. There were two major battles which marked the Sluys Period of the Hundred Years' War. The first was the Battle of Crecy on August 26, 1346. This battle saw an English army of approximately 20,000 defeat a French army of 60,000. The reason for the English victory is threefold. First, the French very unwisely charged the main body of their force into a well-seated English infantry defense, anchored on the right flank by a river near Crecy, and on the left by the village of Wadicourt. (The first wave of the French attack comprised of well-trained Genoese mercenary cross-bowman. The advance of the Genoese on the English proved disastrous because of the limited range of their cross-bows (less than 150 yards) and the impetuous charge of the armored French cavalry over the crossbowmen. See *Id.* at 355-356.)

Second, the English very successfully employed the use of the long bow to decimate the first wave of the French attack. Third, and most importantly, for the first time since the Roman legions, the English employed a professional fighting force raised under the indenture system and seasoned with veterans of the Scottish Wars. Although all the English soldiers owed allegiance to the King through his vassals, they were paid fighting men whose term of service was for the "duration." See *Id.* at 354. The English force was militarily superior to French force which, in part, was made up of an undisciplined rabble of 25,000 feudal levies.

After sixty years of intermittent fighting and the onset of the plague, King Richard II (Edward III's grandson) of England and the French King Charles VI executed the Peace of

The Battle of Crecy left 1,542 dead French lords and knights, between 10,000 and 20,000 men-at-arms, crossbowmen, and infantrymen and thousands of horses. Compared to English losses of approximately 200, Crecy was a major English victory. See *Id.* at 356.

The impact of a trained professional army and the devastating employment of the longbow would be recognized at Crecy. "Crecy was different. Here was a clear-cut victory in the open field of steady, disciplined infantrymen over the finest cavalry in Europe—even though atrociously led. Edward . . . proved himself the master tactician of his time. Understanding the value of disciplined infantry against cavalry, and aware of the devastating fire power of his longbowmen, he made optimum use of the force at his disposal." *Id.* at 357. For the first time in medieval Europe, the English proved that a well-disciplined and led professional force could defeat a numerically superior feudal army.

The impact of the longbow and the professional English infantry would be felt again by the French at the Battle of Poitiers (September 19, 1356) and Agincourt (October 25, 1415). The Battle of Poitiers pitted King John of France, against English Prince Edward (The Black Prince). After Crecy, English raiding parties led by the Black Prince ran free through much of France, while the French remained within the confines of fortified cities. At Poitiers the French intended to end Prince Edward's plundering of the countryside and confiscate his extensive booty train. Unfortunately for the French, the lessons of Crecy were not well learned. King John of France, dismounted his heavy cavalry on the supposition that this was the only way to defeat the English infantry. "John did not understand that the secret of the English success at Crecy had been the use of dismounted men-at-arms only as a solid defensive base for the devastating fire power of the English archers. By dismounting his knights he deprived them of their principal assets for offensive action: mobility and shock." *Id.* at 358.

At Poitiers, King John led French army of three battles, or divisions, each comprising nearly 10,000 men and 8,000 light cavalry. Prince Edward's army was approximately 12,000 strong, 3,000 of which were archers. All were professional indentured troops. Just as at Crecy, the French attacked a well established English position anchored on both flanks. The first French attack was completely uncoordinated, with the French crossbowmen lined behind the French light cavalry, making them completely ineffective. The first French battle withered under sustained fire by the English archers. The second French battle, led by the Dauphin (Prince of France), consisted of the dismounted and heavily armored knights and men-at-arms, was able to reach the English line of battle, and engage the English infantry. Unfortunately, the third French division, led by the Duke of Orleans, broke and ran from the battlefield after seeing the Dauphin's division take heavy losses from the English defilade fire. Finally, the fourth French battle, led by King John himself, was thrown into the fray after marching over mile in heavy armor. Prince Edward committed his reserve of 400 men-at-arms and attacked, repulsing the French. King John was captured in the engagement and ransomed for 3 million gold crowns. The end result was another crushing defeat for the French. See *Id.* at 358-359.

Paris in 1396, agreeing to a thirty years truce.²⁸ This uneasy peace would end with the ascension of King Henry V to the throne of England. Henry was able to take advantage of civil strife in France between the rival dukedoms of Orleans and Burgundy. Using the division of the French royal families to his advantage, Henry negotiated an alliance with John of Burgundy whereby John agreed to remain neutral and Henry would grant John increased territory after his invasion of France. Henry hoped to recover lost English territory, but, more importantly, to reactivate the English claim to the French crown that been pursued by Henry's great-grandfather, Edward III, at the beginning of the Hundred Years' War.²⁹

In 1415, Henry sailed for Normandy with 12,000 men to begin his campaign against France. Henry based his just right invade on his great-grandfather's (Edward III) claim to the French throne. During the first month of his campaign, Henry lay siege to the city of Harfleur.³⁰ After the capture of Harfleur, Henry's army was depleted to 9,000 men though casualties and disease. Henry attempted to evade a decisive engagement with the French after Harfleur given the degraded condition of his army. A French army of 30,000 under the

²⁸ *Id.* at 360.

²⁹ Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 Am. J. Int'l L. 1, 5 (1992).

³⁰ Interestingly, Shakespeare's Henry gained the surrender of Harfleur by threatening to sack the city if the mayor did not capitulate. Historians believe that Henry actually sacked Harfleur, forcing all inhabitants out of the town. Under *jus gentium* (the law of nations) of the time, it was unlawful to kill children (possibly even non-Christian children), women, agricultural folk, peaceable civilian population, foreigners and clerics and members of religious orders. However, when a city was taken under siege almost any license was condoned by law. Siege warfare was waged in accordance with the rule of "war to the death without quarter." Women could be raped and all men killed. Spoliation of this sort was not considered an act of war, but a sentence of justice. These harsh norms, maintained though medieval times, were questioned and brought into doubt by Renaissance writers on *jus gentium*. Meron, *supra* note 29, at 24-26.

command of Charles d'Albret, Constable of France, closed on Henry's force and pressed him into battle at the town of Agincourt.

At Agincourt, Henry positioned his army at the southern end of a freshly plowed field, approximately 1,000 yards in width. The field was flanked heavy woods on either side. Henry's army consisting of 900 men-at-arms and 8,000 archers deployed in a defensive position across the width of the field, with his archers taking flanking positions in the woods. To entice the superior French force into battle, Henry moved his infantry approximately one-half mile toward the French. Just as at Poitiers, the overly-confident French threw their dismounted men-at-arms into the attack. Movement was slow under the heavy armor and over the freshly plowed, wet field. An initial French cavalry attack was cut down by English archers, and the dismounted men-at-arms were subjected to the same treatment. Although suffering heavy losses, the French infantry reached the English line. At this point, the English archers left their positions in the woods and conducted a flanking attack on both sides of the French army.³¹

The French losses were at least 5,000 noblemen killed and another 1,000 captured. The Constable of France was killed and the Duke of Orleans was captured. Most of the important leaders of the Dukedom of Orleans were killed, assuring the ascendancy of the Burgudians (with whom Henry was allied) in France.³² On May 21, 1420, King Charles VI of France

³¹ During the ongoing battle at Agincourt, some French cavalry attacked Henry's rear camp and baggage train. There is some evidence that the French killed the English pages located in the rear camp, although the primary purpose for the raid appears to be the accumulation of spoils. Upon hearing of the French attack, Henry feared that his army might be flanked by the French cavalry. Given this situation, Henry ordered that all French prisoners be killed. Meron, *supra* note 29, at 35-38.

³² DUPUY & DUPUY, *supra* note 26, at 415.

would sign the Treaty of Troyes in which Charles disinherited his son, the Dauphin Charles, declared Henry his heir, and gave Henry his daughter Catherine in marriage.³³

The Hundred Years' War is worthy of study for four reasons. First, the fall of feudal armies and the rise of professional armies in Europe greatly increased the efficiency of the military.³⁴ Additionally, the ability to project power and influence the world balance of power was greatly enhanced. Second, the development and utilization of the long bow greatly enhanced the tactical advantage of armies as was seen at Crecy, Poitiers and Agincourt. Advances in weaponry would effect the further development of discrimination combat (*jus in bello*).³⁵ Third, the Hundred Years' war illustrates well the operation of the

³³ *Id.* at 412. Henry would die suddenly in August 1422 and his 9-month-old son, Henry VI would ascend to the throne. Much of France would be consolidated under English control under the leadership of John, Duke of Bedford (Henry V's brother), as regent to Henry VI. In 1429, the French would revive their resistance to English rule under Joan of Arc, a 17-year old peasant girl who convinced the Dauphin that she had a "divinely inspired mission to help him to expel the English from France and to have him crowned as rightful king." Under the inspiration of Joan, who many believed was a saint, the French won numerous victories which culminated in the triumphant coronation of the Dauphin as Charles VII. Joan was captured by the Burgundians and turned over to the English where she was tried by a religious court as a heretic. Jealous of Joan's popularity and increasing power, Charles made no effort to bargain for her release. Joan was subsequently burned at the stake. After Joan's execution, morale among the English soldiers in France plummeted, fearing they had killed a saint. The French steadily won back the their lost possessions. By 1453, the English were completely expelled from France, except for Calais, and the Hundred Years war came to a close. See *Id.* at 416-418.

³⁴ The advent of the Hundred Years' War marked the decline of the feudal system. For the first time, soldiers fought not out of obligation to their vassal, but for paid wages. For example, at Agincourt, Henry V's archers were paid three times the wages of a skilled laborer. This accounted for better morale and discipline in the army. NICKERSON, *supra* note 25, at 68-69. The rapid expansion of a money economy in the 16th century shook the agricultural basis of the feudal system. Overlords could now maintain armies over longer periods of time through the promise of regular wages. Paret, MODERN STRATEGY, *supra* note 25, at 13.

³⁵ Gustavus Adolphus, King of Sweden (1611), who be the first sovereign to employ a strict military system in the modern sense. Gustavus divided his army into infantry, cavalry and artillery units. He further subdivided these units into basic tactical units, or squadrons,

Chivalric code. Chivalry would all but vanish in the century following the Hundred Year's War, but remnants of the code can still be found in modern international law. Fourth, the manner in which the concept of just war was applied as it existed at the time.

During the Hundred Years' War the bulk of *jus gentium* (laws of nations) was the law relating to war (*jus armorum*).

The customary rules of *jus armorum*, or *jus militare*, regulated the conduct of soldiers within Christendom, but not between Christians and Muslims or other non-Christians. *Jus armorum* was not . . . a body of law governing the relations between contending nations, but a body of norms governing the conduct of warring men.³⁶ The law of arms was in fact the law of chivalry applicable to knights and nobility, that is, to those who had the right to bear arms and to make war . . .³⁷

Although the *Jus armorum* was enforced by courts of chivalry, a Knight's personal honor was limited his conduct in battle.³⁸ "The most effective sanction ensuring compliance with the rules of *jus armorum* was the knight's fear of dishonor and public reprobation . . ."³⁹

consisting of 408 men. He also trained his army through frequent maneuvers. "Discipline was strict; every regimental commander read the Articles of War to his troops once a month. Punishment for infractions was heavy, and Gustavus' soldiers has a reputation for good behavior unusual for troops of that day." DUPUY & DUPUY, *supra* note 26, at 529.

³⁶ During much of the Middle Ages, the bellum (corporate/public combat) and duellum (single/private combat) were one in the same. Knights, as the only lawful fighting class, acted as de facto sovereigns in their local territory. Thus, a conflict between two knights (and, possibly, their men-at-arms) was both private and public combat. It wasn't until the hardening of feudal lines into nations during the Thirty Years' War that a distinction could be made between private and public wars. It is this distinction, however, that was the beginning of separating *jus ad bellum* and *jus in bello*. see JOHNSON, JUST WAR TRADITION, *supra* note 4, at 44-47.

³⁷ Meron, *supra* note 29, at 3.

³⁸ It is the residue of the Chivalric code that provided the basis for *jus in bello* of later just war theorists and modern international law.

³⁹ Meron, *supra* note 29, at 3.

The law of warfare during the medieval period was not international but municipal and military.

Generally, four chivalric virtues were identified: prowess, loyalty, courtesy, and glory or prestige. All of these virtues had the practical effect of limiting warfare.⁴⁰ Prowess limited warfare among knights and men-at-arms of equal station. Courtesy recognized mutual respect among knights (e.g. the courtesy of granting quarter). Glory and prestige gained through engaging only those of equal class (glory could not be gained through engaging peasants). This also “required that knights should protect the, not harm, the weak and innocent: women, children, the aged, the sick, clergy, monks, peaceful persons everywhere.”⁴¹

Before Henry could wage his campaign on France sought approval from the Church that his cause was just. Henry embarked on his campaign only after the Archbishop of Canterbury assured him that his claim is not barred by Salic law.⁴² The Just War concept in Henry’s time was made up of three requirements. First, the initiation of war (*jus ad bellum*) be for just (legally and morally) cause, second, the war be defensive in nature (not for territorial aggrandizement, but to defend a rightful claim or grievance), and third, the war be formally and publicly declared by a sovereign prince (e.g. issuance of letters of defiance), who had essentially unrestrained judgment regarding the justness of his cause.

⁴⁰ “The *jus in bello* of just war tradition originated principally in the medieval code of chivalry.” JOHNSON, JUST WAR TRADITION, *supra* note 4, at 47 (citation omitted).

⁴¹ JOHNSON, JUST WAR TRADITION, *supra* note 4, at 135-136.

⁴² Salic law, supposedly authored by the Frankish King Pharamond, governed German lands before Henry’s time. The French attempted to invoke Salic law, which does not allow women and the female line of succession to the crown, to bar Henry’s claim to the French throne. Meron, *supra* note 29, at 5.

During Medieval times *jus ad bellum* (the lawful resort to war between nations) and *jus in bello* (the just conduct of war) were essentially bound to together. “Just cause concerned not only *jus ad bellum* (the right to resort to war)⁴³, but also *jus in bello* (the law governing the conduct)⁴⁴, since it had bearing on the effects of war. Because medieval legal doctrine taught that the lawfulness of the title to the spoils of war turned on the justness of its cause, Henry required good cause to realize his objectives.”⁴⁵

Thus, ensuring that war was justly initiated had the additional practical effect of easing the ability to raise armies and maintain morale. “Only in a just war could the spoils and prisoners be taken lawfully. Whether or not a captor would acquire a property right in the person of prisoners and the consequent right to the payment of ransom hinged in whether or not the war was just.”⁴⁶ Further, soldiers embarking on an unjust war lost any combatant protections provided under *jus gentium* and could be killed if captured.⁴⁷

The Hundred Years’ War was the last great armed conflict effectively limited by the chivalric code. The rise of sovereign nation-states detached from the feudal system of vassals and overlords, marked the decline of knighthood and the rise of absolute sovereignty in the state. The decline of the Holy Roman Empire after the Thirty Years’ War left the

⁴³ In the just war tradition, the *jus ad bellum* is generally “composed of the requirements that a just war be fought on proper authority, for a just cause, and with the further requisite that the end of such war always be peace.” JOHNSON, IDEOLOGY, *supra* note 6, at 26.

⁴⁴ The *jus in bello* is “alternatively described as providing for noncombatant immunity and weapons restrictions, or as exhausting itself in the principles of proportionality [of the use of force] and discrimination (in the choice of those against whom force is used).” *Id.* at 26.

⁴⁵ Meron, *supra* note 29, at 10.

⁴⁶ *Id.* at 10.

⁴⁷ *Id.* at 12.

world society without an external mechanism to enforce the law of nations. The development of deadlier weapons and standing professional armies would greatly increase the destructiveness of war. The primacy of power began to take center stage in international relations.

C. THE NEO-SCHOLASTICS

The rise of Neo-Scholastic theory coincides with the exploration and development of the New World, the Reformation⁴⁸ 16th century, the Renaissance 14th-16th century and the end of the Thirty Years' War in 1648. This marks the transition to the Modern Era of international law.⁴⁹

The following are elements leading to the transition to the modern era:

1. the breakdown of the unity of Christendom, which gave new impetus simultaneously to the idea of ideological war and to the idea of a just war theory based wholly in natural law, free from ideology;
2. the discovery, exploration, and colonization of the New World, which stimulated the attempt to create a natural law/just war theory by thrusting Europeans into contact with peoples totally outside the traditions of European civilization,⁵⁰

⁴⁸ The establishment of the Protestant churches during and after the Reformation did not alter the fundamental idea that war must have a just cause. For example, Luther believed that war was a necessary element of world order, emanating from original sin. The sovereign is duty bound to limit its occurrence. "War is only justified only if it is necessary to protect the peace and well-being of the subjects against external attacks." von Elbe, *supra* note 9, at 670 n.35.

⁵⁰ The Spanish Dominican Francisco de Victoria (1492-1546), Professor of Theology at the University of Salamanca. Victoria wrote during the "golden age" of Spanish hegemony in Europe. Charles V ruled Spain and as the Holy Roman Emperor. This was "a period in which Spanish political and military might and the Catholic religion joined together in directing an empire that extended from central Europe to Mexico and Peru." JOHNSON, IDEOLOGY, *supra* note 6, at 204. Victoria expounded on Thomist doctrine war when he addressed the Spanish conquest of the new world. Victoria concerned himself with the extent to which the war against the native Indians was just.

Victoria believed that the right to declare war was an essential element of its sovereignty. Victoria rejected difference of religion as a just cause of war. The single and only cause for

3. the changing composition of European armies to include in heavy proportion common men having no chivalric heritage, with those descended from the medieval knightly class much reduced in number and placed in position as officer by right of birth;
4. the introduction and growth of military discipline⁵¹ as a response to the requirements of fighting with firearms, as a necessary means of keeping order

commencing a war was a wrong received. A wrongfully injured sovereign must determine the justness of his cause based on divinely-inspired natural law.

Although Victoria held the Spanish conquest of the New World was just--“the Spaniards brought the American aborigines to a higher civilization--he firmly denounced, on the ground of Christian charity, the abuses committed by the conquerors (As in the Crusades the law of *bellum romanum* or *guerre mortelle* applied to the savage Indians. Therefore could be indiscriminately slaughtered without limit.), and dauntlessly refuted the excessive claims raised by the Emperor-then Charles V” Nussbaum, *supra* note 7, at 459. Therefore, Victoria approved of the initiation of war against the Indians (*jus ad bellum*), but disapproved of the conduct of the war (*jus in bello*) (“Victoria’s refusal to treat the Indians as savages little better than animals, and his insistence that they are men and to be treated as such even in the face of a conflict of cultures as severe as any in history, are manifestations of the spirit of modern international law that were only possibly conceivable to medieval man, who knew of alien cultures only by fantasy and hearsay.” JOHNSON, IDEOLOGY, *supra* note 6, at 170.)

Further, Victoria, for the first time, addressed whether war can be just on both sides. This inquiry was necessary because Victoria saw justness in the cause of the Indians who acted against the Spanish out of self defense. At this point he encountered doctrinal difficulty. Victoria held that in cases of doubt, “it is exclusively for the church to determine the justness or unjustness of a war, a determination which, of necessity can be in favor of one side only.” (Victoria believed that the victorious prince was the tool of a divine plan which was designed to establish justice through war. Nussbaum, *supra* note 7, at 460). Therefore Victoria held that war could be just on only one side, but “demonstrable or invincible ignorance-he used either term-excused the unrighteous party, and that in this particular sense war may be ‘just’ on both sides.” *Id.* at 460.

Victoria’s “invisible ignorance” argument would prove to be the first of many criticisms of the just war doctrine by contemporary commentators. If a war can be just on both sides, what will keep powerful nations from embarking on wars of aggrandizement under the guise of misguided justice. Further, how is the “justness” of a nation’s cause to be judged. The notion of “justice” is necessarily subjective among nations with competing interests.

Victoria presented his doctrine as moral theology, not as law. He did not conceive the law of nations (*jus gentium*) as juridical, but as morally based. Enforcement of just war concepts was accomplished through the church. “The formidable power of the church, with her dreaded punishments on earth and in the other world, stood to deter the waging of an unjust war.” *Id.* at 461.

⁵¹ Military discipline as it used here includes discipline in the sense of drill, orderliness (following commands of superiors, not breaking formations to engage in plunder) and a code

among the common soldiers, and as a vehicle for imposing elements of the chivalric traditions of warfare upon the behavior of commoners;

5. the increasing deadliness of warfare, which called into question the calculus of proportionality accepted in an earlier time, when warfare still remained something of a sport;
6. the development of patterns of political relationships outside the relative orderliness of Europe, according to which a condition of war might actually exist between two nations in the Americas, the Far East, or on the high seas, while no formal state of war existed between the nations, calling into question the relevance of the medieval consensus on authority for war.⁵²

1. FRANCESCO SUAREZ

Following Victoria, the Spanish Jesuit Francesco Suarez (1548-1617) was the last of the Scholastics. Unlike Victoria, Suarez' writings focused on judicial theory. Suarez opined that a prince waging a just war sought rightful "vindictive justice."⁵³ This means of obtaining justice, although often inhumane, is indispensable to mankind as no better method can be found.

Suarez attempted to address the actuality of the unjust prince defeating the just. Here, he seems to indicate that the "unrighteous victor restore the spoils."⁵⁴ The enforcement mechanism to be used against the unjust prince was excommunication by the Catholic

of conduct for professional armies (extending the medieval notions of chivalry to the common man.). JOHNSON, JUST WAR TRADITION, *supra* note 4, at 184-185.

⁵² *Id.* at 172-173 (citation added).

⁵³ There are various forms of justice. Two which appear in just war theory are vindictive, distributive justice. According to the notion of vindictive justice "what matters is setting right a wrong already suffered, punishing those who created the wrong." "Distributive justice embodies the "concept of proportionality implies that the evils of war and any goods it might bring should be distributed according to relative guilt and innocence among persons affected by the war." This form of justice is seen in *jus in bello*. Some commentators argue that restraint in war is not based on any notion of justice, but rather on notions of charity, mercy, civilization and humanity. Although these latter terms vary in slightly meaning, the ends they seek to achieve are similar. JOHNSON, JUST WAR TRADITION, *supra* note 4, at 5-9.

⁵⁴ Nussbaum, *supra* note 7, at 462.

pontiff. Suarez claims the power of the Pope over both Catholic and Protestant princes. "In Suarez' times, however, Protestantism was politically so firmly entrenched that his theory of universal papal supremacy and power of punishment fell strikingly short of reality."⁵⁵

Suarez' reliance on the Catholic pontiff to enforce the requirements of just war doctrine reveals a second criticism of the doctrine among contemporary theorists: the lack of a viable enforcement mechanism. This weakness in just war doctrine is especially apparent in the case of a powerful unjust sovereign defeating a weaker just sovereign.

D. SUMMARY OF THE SCHOLASTIC TRADITION

Although the Scholastic theorists justified both offensive and defensive war, the basis for both was retributive in nature. In other words, an offensive war could be justified to correct a past wrong, not for territorial expansion or other purposes of aggrandizement. "In the opinion of scholastics, both offensive and defensive war can be morally justified. Supporting argumentation differs for the two types, and the offensive variety is more severely circumscribed."⁵⁶

The characteristic of the right to engage in offensive war is based on defensive purposes, not overt aggression. For example, an offensive war may be waged to restore the rightful territory of a state, or to protect its commerce and national abroad. The rationale for offensive war is based on the notion that there is no effective mechanism to correct wrongs committed by one state on another:

The moral empowerment of the injured state therefore receives a kind of extension: to pass and execute judgment on those who are normally beyond its jurisdiction. Just as the government may right wrongs and punish wrong-

⁵⁵ *Id.* at 463.

⁵⁶ McKenna, *supra* note 13, at 649.

doers inside its boundaries, so it may act outside. If need be, it may vindicate its community's rights even by violence. The injured state becomes with respect to another nation 'an avenger to execute wrath on him who does evil.'⁵⁷

A major criticism of the just war doctrine is revealed. The difficulty in discerning between those defensive and offensive wars which are just, and those which are not. Since the Scholastic just war doctrine permitted offensive wars of retributive justice, line between justifiable wars and those offensive wars of aggrandizement was very gray.

The Scholastics did not view just war as the lesser of two evils, but as an act of retributive or vindictive justice. "For the scholastic . . . sin is never inevitable; an act of self-defense or vindictive justice, although imposed by circumstances which are regrettable, is morally good."⁵⁸ *The logic of this argument derives from the divinely-inspired nature of the state, and its moral obligation to protect its citizens and interests.*

The Thomist core criteria of just war doctrine: proper authority, just cause, and proper intent were expanded by later Scholastic scholars. By the end of the 16th century, the Scholastic doctrine required that certain qualifying factors must be fulfilled before resorting to war. For the Scholastics, these qualifying factors may be summarized under the following eight headings.⁵⁹

⁵⁷ *Id.* at 650.

⁵⁸ *Id.* at 650.

⁵⁹ McKenna lists seven factors, but for ease of understanding, I have divided the first factor into two. *Id.* at 650-652.

- (1.) The war must be declared by legitimate authority (*bellum publicum*)⁶⁰ in the country which goes to war. This criterion applies primarily to offensive wars, since these seek vindictive justice based on the exercise of the divinely authorized judicial and executive power of the state.
- (2.) "War must aim at a good which is universal rather than exclusive. Peace and the sacrifice even of a just claim may therefore be necessary sometimes for the community."
- (3.) The injury the war is intended to prevent or rectify must be real and certain (e.g. seizure or retention of territory, breach of the personal liberties of nationals abroad, or similar impositions on a third state). In addition, some moralists believe that the nation going to war should be certain of the other parties moral culpability, discounting with assurance any suggestion of inadvertence on the part of the offending nation.⁶¹

⁶⁰ At the center of the Scholastic just war doctrine is the concept of a political society. For the Scholastics, a civil society is a natural entity and therefore is divinely instituted. "God, as the author of man's natural needs, aptitudes and tendencies, is also author of the social structure which are built upon them." *Id.* at 649.

Under divinely-inspired natural law, the state is a social structure. As with all social structures, certain moral characteristics apply. These moral characteristics of the states include the following: first, the obligation to seek the welfare of its citizens; second, and linked to the first, the right to justified and proportional self defense; third, the moral authority of the state to rule its citizens, to command, judge and execute, and; fourth the right to engage in offensive war. *Id.* at 649-650.

The concept of the "state" as understood by the Scholastics is quite different than the way it is defined in contemporary times. For the Scholastics, the "state" equated to the divinely-inspired sovereign prince. As such, the prince held the right under natural law to govern his citizens and his citizens had an obligation to support their sovereign. The Scholastics assumed the divinely-inspired sovereign would act in a just manner. Thus, a criticism of the just war doctrine is revealed: the subordination of the rights of the citizenry to the will of the sovereign, who may or may not be acting in a just manner.

The Scholastic approach focuses responsibility for state action on the moral judgment of the sovereign leadership. The sovereign prince's *right* to execute a just war derived from divine natural law. By virtue of this divine right, the sovereign had a *moral obligation* to exercise that right in a just manner and for the protection of his citizens.

⁶¹ "The interpretation of the traditional criterion of harm done to require that it be *material harm against the state or its citizens* removes the . . . possibility that religion might be a just

(4) The seriousness of the injury must be proportioned to the damages that the war will cause. No criteria are laid down for weighing either factor, except that the assessment must be made in terms of moral rather than material gains and losses. *Self-defense, however, always justifies resistance.*

(5.) There must be a reasonable hope of success in the waging of war. If defeat is certain, hostilities will only aggravate the injustice and bring no good.

(6.) Hostilities may be initiated only as a last resort. Negotiation, mediation, arbitration and judicial settlement must be utilized first. Scholastics have demanded as a necessary prerequisite for military action, an ultimatum or a formal declaration of war, since these are the last measure of persuasion short of force itself.

(7.) A war must be prosecuted by responsible agents with legitimate intentions. "A war is otherwise just becomes immoral if its waged out of hatred. A war of self-defense becomes immoral if, in its course, it becomes a instrument of expansion. A war to vindicate justice becomes immoral if, as it goes on, it becomes a means of aggrandizement."⁶²

(8.) The particular measures used in conducting the war must themselves be moral (*jus in bello*).⁶³

cause for defensive war; simultaneously this interpretation begins the movement toward complete repudiation of offensive war that reaches a climax in the twentieth century." JOHNSON, IDEOLOGY, *supra* note 6, at 170.

⁶² McKenna, *supra* note 13, at 652.

⁶³ "Theology prior to the sixteenth century concentrated almost exclusively on the right to declare war, the *jus ad bellum* . . . Theology was much less concerned with what a soldier was permitted to do in prosecuting a war once it was sanctioned as a just and legitimate conflict." Howard, The Laws of War, *supra* note 25, at 30. With the Scholastics of the 16th and 17th century, the doctrine of just in bello began to emerge as completely separate from the *jus ad bellum* and was specifically enumerated as a condition to just war. For example, the neo-scholastic William Ames, a Calvinist theologian (1576-1633) in his *Conscience, with the Power and Cases Thereof (De Conscientia)* (1639), lists these criteria of just war: 1. just

1. IMPACT OF THE THIRTY YEARS' WAR ON THE DEVELOPMENT OF INTERNATIONAL LAW

The Thirty Years' War would profoundly effect the development of *jus ad bellum*.⁶⁴ The Thirty Years' War (1618-1648) began as a religious war between Roman Catholics and Protestants in Germany, part of the Holy Roman Empire.⁶⁵ The war would turn into a political struggle. The Hapsburg Dynasty, aligned with the Holy Roman Empire, allied with most of the German Catholic princes, and Spain, attempted to control much of the continental Europe, opposed by the Protestant princes of Germany, the Kingdoms of Denmark, Sweden and Catholic France. The fighting ranged all over Germany and into France, Spain, Italy, and the Netherlands.⁶⁶

The Thirty Years' War ended with the Peace of Westphalia in 1648, which consisted of two treaties. The Holy Roman Empire and France signed the Treaty of Munster and the Empire, Sweden and the German Protestants signed the Treaty of Osnabrück. Both treaties were guaranteed by France and Sweden. The lasting effect of the Peace of Westphalia was the recognition of independent sovereign nation-states, ruled by an absolute monarch.

cause, 2. just authority, 3. right intention, 4. just manner of waging. The fourth criterion "is the *jus in bello* in capsule form, set by Ames into equality with the medieval criteria . . ." JOHNSON, IDEOLOGY, *supra* note 6, at 172. Similarly, Matthew Sutcliffe, the Dean of Exeter (1550-1629) in his *Lawes of Armes* lists four requisites for just war: 1. just cause, 2. sovereign authority, 3. requirement of demand for restitution, denunciation or satisfaction, and 4. wars may not be prosecuted with barbarous cruetie. *Id.* at 174.

⁶⁴ By the end of the Middle Ages, the just war criteria of the "right intention for war" was divided into its component parts: the *jus ad bellum* and the *jus in bello*. This is a substantial departure from thirteenth century just war doctrine which was concerned almost exclusively with the *jus ad bellum*. However in the sixteenth century, "it was the responsibility of every man fighting a just war to keep it just by rooting out from his own soul" any evil intention he might have against another man. *Id.* at 78.

⁶⁵ DUPUY & DUPUY, *supra* note 26, at 533.

⁶⁶ *Id.* at 533.

The Peace of Westphalia formally accorded to the princes and potentates of the Empire a qualified international status. The religious settlement stipulated for an exact and reciprocal equality among them in ecclesiastical affairs, thus ensuring their independence from imperial control in this respect. The political settlement divided the international capacity between the Empire as a whole and its component states The effect of this settlement was to limit the international capacity of the Empire by attributing partial capacities to its component parts. More than three hundred quasi-states were formally inducted into the international community.⁶⁷

The principle of equality among sovereign nations was established at Westphalia, ". . . . the dominant view in the study of international politics. . . . regards the Westphalia system as the starting-point of modern international relations."⁶⁸

As will be discussed below, the birth of independent nation states at the close of the Thirty Years' War and the principle of equality among nations it accorded is a necessary condition for the naturalist concept of just war to work. Probably the best known of the naturalist school, Hugo Grotius⁶⁹ rested his theory of just war on the notion of state sovereignty:

. . . . the Grotian system depends upon a full and unqualified recognition of the doctrine of territorial sovereignty from which flow the corollaries that all states are formally equal, and that territory and jurisdiction are coextensive. Such was the basis of the settlement embodied in the Peace of Westphalia, so far as the written treaty was concerned, and upon that basis it has been

⁶⁷ DICKINSON, *supra* note 3 at, 231-232.

⁶⁸ Onuma Yasuaki, *Introduction*, in A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS 4 (Onuma Yasuaki ed., 1993) [hereinafter Yasuaki, A NORMATIVE APPROACH]. The doctrine of state sovereignty was formulated in 1576 by Jean Bodin in his *De Republica*. As unified states were emerging from the many feudal vassal states, the central authority of a supreme monarch became apparent. "Bodin concluded therefore that the essence of statehood, the quality that makes an association human beings a state, is the unity of its government . . ." J.L. BRIERLY THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 8 (Sir Humphrey Waldock ed. 1963). Bodin, as other international theorists of his time, did not view the sovereign power of the prince to be unrestricted. He believed the sovereignty of states was limited by natural law and morality. Thus, a sovereign ruler, restricted by law, could not use the power of the state for immoral or unjust ends. By the eighteenth century, however, the notion of sovereignty is wholly equated with the unfettered might of the state.

claimed form that day to this that, before the law of nations , the legal rights of the greatest and smallest states are identical.⁷⁰

E. NATURALIST THEORY

The naturalist school of philosophy developed between the sixteenth and seventeenth centuries. This development is significant as it further secularized just war doctrine. Power shifted to a nation's citizens, who, in turn, entrusted their welfare to the sovereign. Further, the universality of natural law (applying to all men equally regardless of religion or origin), would be fully developed by naturalist theorists.

The philosophical or pure law of nature school held that the law of nations was nothing more than the law of nature applied to separate states in a state of nature; they accordingly denied to the customary, conventional, or positive element any of the attributes of true law apart from natural law.⁷¹

The great advantage of rooting just war theory in natural law, instead of divine revelation, is naturalist theory offers a universality to all cultures.⁷²

⁷⁰ DICKINSON, *supra* note 3, at 232 (citing TAYLOR, INTERNATIONAL PUBLIC LAW §69, at 98). It should be noted, however, that the Peace of Westphalia did not grant nations equal legal capacity. International legal capacity was still partially held by the Holy Roman Empire and the strongest world powers at the time, France and Sweden. France and Sweden guaranteed the Peace of Westphalia from breach by any other states.

⁷¹ DICKINSON, *supra*, note 3 at 69. In the sixteenth century, Lutheranism went so far as to challenge the hierarchy of the Church. "Luther's message was that religiously each person stands alone before God, needing no priestly intermediary." The Anabaptists (e.g. Amish, Friends) went even further. They argued "for the right of the individual to challenge temporal authority when, in his status directly before God, such an individual Christian should realize that the rule in effect was ungodly." JOHNSON, JUST WAR TRADITION, *supra* note 4, at 51. The Anabaptists are one of the few religions who refuse all combat as vile before God.

⁷² "[T]he general assumption is that 'nature' is shared by all humanity, that in it are to be found concepts, including moral guidelines for individual and social behavior, which if identified would claim the ready assent of all humankind." JOHNSON, JUST WAR TRADITION, *supra* note 4, at 85. "Natural law is a type of what Schwarzenberger has called 'community law'; it presupposes a consensus as to what nature is. Only in a context of broad cultural unity including unanimity of values can natural law appeals be self-evident. See infra. at p. ?. Classical Rome provided one such context; medieval Christendom provided another. *Id.* at 111 (citing, SCHWARZENBERGER, FRONTIERS OF INTERNATIONAL LAW Chapter I (1962)).

1. GROTIUS

With his *De Jure Belli Ac Pacis* (1625), the Dutch jurist Hugo de Groot (Grotius)⁷³ (1583-1645), often considered the father of international law as well as the father of modern natural law,⁷⁴ departed from the Scholastic approach to just war. Grotius argued that the sociability of men was derived from nature. The moral conscience of men drove society: "To Grotius, the individual conscience is the touchstone of justice rather than the judgment of the priest or the canons of the church."⁷⁵ Grotius secularized just war theory by pronouncing that his theory would hold true "even if there is no God or if the affairs of men are of no concern to Him."⁷⁶ Under Grotian theory, the *jus gentium* (the law of nations) is derived from natural law.⁷⁷

⁷³ Grotius lived through the Thirty Years' War. Specifically, the Netherlands' War of Independence. "He lived in exile during most of the Thirty Years' War and died before the Peace of Westphalia. . . . [H]e constantly witnessed disturbances and wars. This was the main reason he wrote his masterpiece, [DE JURE BELLI AC PACIS]. He Belonged to the Arminian school of Calvinism, and sought to overcome denominational differences and to unite the church from the advocate of religious tolerance." Yasuaki, A NORMATIVE APPROACH, *supra* note 68, at 11 (footnotes omitted). "He was tried and imprisoned for alleged treason in 1618, but escaped . . . to Paris, where he lived until 1631. His political troubles in Holland can be traced to his religious views, which were Arminian (Derived from the Dutch Calvinist theologian Jacobus Arminius)." For served as the Swedish ambassador to France for eleven years. JOHNSON, IDEOLOGY, *supra* note 6, at 256 (parenthetical added).

⁷⁴ Yasuaki, A NORMATIVE APPROACH, *supra* note 68, at 1.

⁷⁵ Nussbaum, *supra* note 7, at 466.

⁷⁶ *Id.* at 466 (citing GROTIUS, DE JURE BELLI AC PACIS, "Prolegomena," ix (1625)). This secularized view was an extraordinarily novel, and dangerous approach given the time in which Grotius lived. "Although Europe was in the midst of violent religious wars during Grotius' life time, "they were still struggles between Catholics and Protestants within the framework of Christianity. To repudiate Christianity itself, or to go beyond the framework of Christianity was a purely theoretical exercise. An it is clear that Grotius did not live in such a purely theoretical world." Yasuaki, A NORMATIVE APPROACH, *supra* note 68, at 4.

⁷⁷ JOHNSON, JUST WAR TRADITION, *supra* note 4, at 93.

This was a major innovation in just war theory. Grotius claimed that the law of nature and international law derived therefrom could stand without a divine foundation.⁷⁸ Unlike the Scholastics, Grotius did not discriminate against the infidels. His theory applied to all men. This change had the effect of mobilizing the forces of faith behind the rule international law.

A weakness in Grotius' theory is that he presumed all sovereigns act in accordance with reason and morality. Although Grotius believed that true objective justness could only rest in one party to a conflict, the determination of justness was left to the sole judgment of the sovereign.⁷⁹

Grotius recognized the right of self-defense and self-preservation to be the most basic under natural law. Thus, nations always had a right to protect themselves from the threat of force, or the use of force.

... the justification of war from the viewpoint of self-preservation and self-defence, which allows counter-attacks by force against attacks by force, constitutes the most important ground for demonstrating the permissibility of war under the law of nature, the law of nations, and the law of the Gospel. This indicates that Grotius regards the use of force for self-preservation and self-defence as the most natural and self-evidently justifiable use of force.⁸⁰

⁷⁸ It is important to note that, "Christian religion [was] universal in medieval European culture (The hegemony of Christendom), so that the morality of the Church had a real claim on all those whose use of force the Church sought to regulate; this morality was expressed in terms of law binding on all the faithful. In this period-and well beyond-Church law regulated many aspects of life today thought of as entirely matters for the rule of state. This law at the time was held to be universal, as a positive expression of the will of God, whether known through nature or through revelation. In this period the religious and the secular were mixed up together . . ." *Id.* at 47.

⁷⁹ Pufendorf would direct sovereigns to attempt one of the following three courses before resorting to arms: 1. a conference between the parities, 2. an appeal to arbitrators, or 3. use of the lot. von Elbe, *supra* note 9, at 680.

⁸⁰ Yasuaki, A NORMATIVE APPROACH, *supra* note 68, at 66 (footnote omitted). Grotius denies the implication of the anti-war precepts in the Gospel. For example, "The passage in the Sermon on the Mount, 'whosoever shall smite thee on the right cheek, turn the other also' is not construed as meaning that no injury should be resisted, but is restricted to such minor

Grotius recognized the right to anticipatory self-defense as part of natural law: "Defence . . . basically consists of counter-attacks against imminent attacks on one's life, body, or property."⁸¹ Grotius argues that it is not necessary "to wait for a blow to be struck before striking in self-defense. But to employ such preemptive self-defense it is absolutely required that the other's intent be certain. Uncertain fear of a neighboring country whose power is swelling is explicitly named as an unjust cause for war."⁸² Recovery of property is also included in the concept of defence, as long as the violation in question is presently being committed.⁸³

injuries a slap on the cheek. The precept 'Love thy enemy' (MATTHEW 5: 44) is incorporated into a hierarchy of discriminatory love based on 'the law of properly ordered love.' 'Recompense no man evil for evil' (ROMANS 12: 17) is interpreted as a prohibition of vengeance based on some private motive, not a ban on revenge inflicted by public power." (footnote omitted). *Id.* at 71.

⁸¹ "Counter-attack by force is not permissible if the danger is merely assumed; it is allowed only when the danger is immediate and certain (*presens et certum*), and there is no other way it can be averted." *Id.* at 87 (footnote omitted).

⁸² JOHNSON, IDEOLOGY, *supra* note 6, at 214-215.

⁸³ Grotius categorized the different types of war as follows:

A. Just cause of war

1. Defence (*defensio*) against imminent attacks on life, body, property, or their legal rights and entitlements.

2. Restitution of Things (*Recuperatio rerum*).

(i) That which is based on agreement (*pacto*).

(ii) That which is based on wrongful act (*maleficium*).

(iii) That which is based on law (*lex*) [e.g. rights of ambassadors and legates].

3. Punishment (*punitio*). Onuma 77-78. (In a break from the

Scholastic tradition, Grotius permitted for the prosecution of punitive wars by private person. Scholastics only allowed such a war if executed by public authority. The notion of punitive wars would be denounced by 18th century philosophers such as Immanuel Kant. Nevertheless, Kant continued to uphold "... the right of an injured state against its enemy in asserting what is its own [with] no limits because such war is waged against an unjust enemy." von Elbe, *supra* note 9, at 683).

Grotius believed that a prince's right to resort to the use of force in self-defense is derived from the prince's primary concern, the protection of the nation. For Grotius, the prince is not the "minister of God", but "the guardian of his people's lives, property, and prosperity."⁸⁴

Grotius' enduring contribution to international jurisprudence is threefold. First, he secularized just war theory by deducing the just war criteria from natural law, instead of the divine God.⁸⁵ Second, he theorized that justice is derived from natural law and therefore is not part of man-made positive law, but a higher law. Third, growing from the notion of natural justice, Grotius held that all states have the inherent right of self-help, to include preemptive self-defense and punitive and retributive measures such as reprisal.⁸⁶

Restitution and punishment, are involved when an act of violation has already been committed. Of these, restitution is an extremely comprehensive cause. It is not limited to wars against violation of property rights. Other rights guaranteed by war include the right to rule, or governing power (*imperium*), over others, rights held by supreme rulers provided in treaties, and rights under the law of nations concerning diplomatic missions and burying of the dead.

Punishment, as a just cause for war is described this way:

Punishment is an 'evil of pains which is inflicted because of an evil action'. Because of their evil-doing, those committing such acts place themselves in a position inferior to other human beings. Consequently, according to the law of nature, anyone other than those in the same inferior position is entitled to inflict punishment on the evil-doer. Yasuaki, A NORMATIVE APPROACH, *supra* note 68, at 79 (footnote omitted).

⁸⁴ JOHNSON, IDEOLOGY, *supra* note 6, at 218.

⁸⁵ Grotius rejected the universal title of the Catholic Church. "Religious power is valid only for the salvation of souls, and as such does not apply to secular matters." Yasuaki, A NORMATIVE APPROACH, *supra* note 68, at 82 (footnote omitted).

⁸⁶ It cannot be said that Grotius' broad notion of permissive state action was not without limits. In addition to the traditional just war criteria of proper authority, just cause and proper intent, Grotius also required that the charitable notion of proportionality, which is also derived from natural law, be applied when using justifiable force against another nation.

2. THOMAS HOBBES

"The system of Hobbes (1588-1679) was the antithesis of that of Grotius in respect to its method and leading principles."⁸⁷

Where Grotius defined law in terms that left its binding force to be inferred from its character as law Hobbes . . . [defined law] as the command of a sovereign power. Hobbes divided law into divine and human according to its source, and the divine into natural and positive according to the means whereby God made his will known to men--natural reason in the case of the former, revelation in the case of the latter.⁸⁸

Hobbes drew a clear distinction between natural law (*lex naturalis*) and natural right (*jus naturale*). "While the former implied restraint the latter implied liberty of every man to do whatever seemed best for the preservation of his existence. The equal rights of men made the state of nature in Hobbes' theory a state of war."⁸⁹

Hobbes believed that all men were created equally in nature and, as created, had an equal natural right for self preservation. "In such a state of nature every man was endowed with an equal natural right of self-preservation, which carried with it a natural right to do everything necessary for self-preservation, and to be supreme judge as to what was necessary to the end."⁹⁰ Therefore, ". . . natural rights were the equivalent to natural mights; their sanction was force. In short, the state of nature was a state of war."⁹¹

The following passage from Hobbes' *Leviathan* is indicative of his theory:

⁸⁷ DICKINSON, *supra* note 3 at 70 (parenthetical added).

⁸⁸ *Id.* at 71 (citations omitted).

⁸⁹ *Id.* at 72 (citing, THOMAS HOBBES, LIBERTY, I, at 7; DOMINION, XIV, at 3; LEVIATHAN, Pt. I, ch. 14, at 86).

⁹⁰ *Id.* at 73.

⁹¹ *Id.* at 73.

Seeing then to the offensiveness of man's nature one to another, there is added a right of every man to everything, whereby one man invadeth with right, and another with right resisteth; and men live thereby in perpetual diffidence, and study how to preoccupate each other; the estate of men in this natural liberty is the estate of war. For war is nothing else but that time wherein the will and intention of contending by force is either by words or actions sufficiently declared; and the time which is not war is peace.⁹²

Hobbes analogized the natural state of individual men to the natural state of sovereign nations. Thus, all nations had an absolute right to self-preservation. Therefore, the natural state of nations was one of conflict and war.

Hobbes theorized that the power of the sovereign was absolute, even over God and nature.

Hobbes propounded a conception of sovereignty as supreme and unlimited power that was more extreme than anything which had been defended previously. He made the will of the state the source and criterion of all right, thus eliminating all confusion as to the relation of the sovereign to the laws of God, nature, and of nations. So far as subjects were concerned, the sovereign's judgment was the law of God, the law of nature, and the law of nations.⁹³

Hobbes argued that man agrees to live in society in order to achieve the desired end of self-preservation. Upon consenting to live in society, man yields his authority to act in self-preservation to the state. Living within society enables man to acquire the advantage of security. "For Hobbes, the state or commonwealth is established on the basis of a social contract to secure self-preservation, which lies at the core natural right."⁹⁴

Therefore, although the natural state among nations is one of war, nations will act sociably toward each other, as they derive benefit from doing so:

⁹² Schwarzenberger, *Jus Pacis Ac Belli?: Prolegomena to a Sociology of International Law*, 37 AM. J. INT'L L. 460, 460 (1943)(citing Hobbes, LEVIATHAN, Ch 13).

⁹³ DICKINSON, *supra* note 3 at 74.

⁹⁴ Yasuaki, A NORMATIVE APPROACH, *supra* note 68, at 36 (footnote omitted).

.... the establishment of states introduces a kind of society among them, similar to that which exists naturally among men, and the same reason which induce men to maintain union among themselves ought also to persuade nations or their sovereigns to live on good terms with one another.⁹⁵

Hobbes' theory regarding relations among men, and by analogy among nations, is summed up well in this statement:

While. starting from man's instinct for self-preservation, Hobbes claims that everyone must abandon his freedom and strive toward the establishment of a state, for otherwise the freedom granted to him for the sake of self-preservation will result in a condition of 'war of all against all (*bellum omnium contra omnes*)' and deny him the very right of self-preservation.⁹⁶

It is necessary, therefore, that there should be some law among nations to serve as a rule for mutual intercourse. This law can be nothing else but natural law itself, which is then called the right or law of nations. ". Hence the general principle of the law of nations is nothing more than the general law of sociability, which obliges nations having intercourse with one another to the practice of the same duties as those which individuals are naturally subject"⁹⁷

Hobbesian theory marked a significant departure from Scholastic and traditional Naturalist theories for a number of reasons. First, Hobbes recognized that the state of relations among nations is one of self-preservation. Second, the struggle for self-preservation among nations leads to a natural state of war. Third, just as men agree to live in societies to further their own self-preservation, nations agree to form an international society so that disputes may be settled by peaceful means. Without such an agreement among nations, the world would be in

⁹⁵ DICKINSON, *supra* note 3 at 87.

⁹⁶ Yasuaki, A NORMATIVE APPROACH, *supra* note 68, at 65.

⁹⁷ DICKINSON, *supra* note 3 at 87-88 (citing, BURLAMAQUI, PRINCIPES DU DROIT NATUREL (1747)).

constant conflict as nations struggle to secure their self-interests with the paradoxical result of diminishing the security of all nations.⁹⁸

3. EMERICH DE VATTEL

Vattel belonged to the eclectic school of international legal theory. The eclectic school began to develop in the 18th century combining natural law theories with those of the positive law. Eclectics adopted a twofold division of the natural or necessary law of nations and the voluntary or positive law of nations founded on consent.⁹⁹ Emerich de Vattel (1714-1767)¹⁰⁰, expounding on the writings of his mentor, the German jurist and philosopher Christian von Wolff (1679-1754), opined that natural law applied to relations among nations and voluntary law of nations presumed the consent of nations. Vattel enunciated the

⁹⁸ In summary, Hobbesian approach to the law of nations is as follows:

1. All men are equal, possessing equal natural rights to self-preservation;
2. Because all men possess an equal an inherent right to self-preservation, the natural state among men is one of conflict;
3. Men form nations because they derive benefit from living in societies;
4. The primary benefit from living in society is the avoidance of conflict in furtherance of self-preservation;
5. In so choosing to live in societies (i.e. nations), men agreed to be governed by a sovereign, who, in turn, is subject to natural law;
6. In analogy to men living in societies, nations form an international society with the same natural right to self-preservation;
7. All nations have the natural right to self-preservation and an obligation to abide by natural law. The natural law of man and the natural law of nations are the same. Natural law and the law of nations are one in the same;
8. Thus, although the state of relations among nations is one of conflict and war as each pursues its right to self-preservation, nations will act sociably toward one another, unless wrongfully aggrieved.

⁹⁹ DICKINSON, *supra* note 3, at 95.

¹⁰⁰ EMMERICH DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (1740).

principle of sovereign state equality,¹⁰¹ using similar logic as Hobbes, in very precise language:

Since men are by nature equal, and their individual rights and obligations are the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a states of nature, are by nature equal and hold from nature the same obligations and the same rights. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.¹⁰²

Much in the Naturalist tradition, Vattel recognized the absolute sovereignty of states in their internal affairs and in relation to one another:

Since Nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfill its duties, the effect of this is to produce, before the world at least, a perfect equality of rights among Nations in the conduct of their affairs and in the pursuit of their policies. The intrinsic justice of their conduct is another matter which it is not for other to pass upon finally; so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights.¹⁰³

From this equality it necessarily follows that what is lawful or unlawful for one Nation is equally lawful or unlawful for every other Nation. A nation is free to act as it pleases, so far as its acts do not affect the perfect rights of another Nation, and so far as the Nation is under merely internal obligations without any perfect external obligation.

4. SUMMARY OF THE NATURALIST TRADITION

The differences between the Scholastic approach to the law of nations (*jus gentium*) and just war and the Naturalist approach are epistemological. Nevertheless, they both arrive at

¹⁰¹ Just as Grotius had written earlier, Vattel believed the power of the sovereign rests in the will of the people, not as an agent of God.

¹⁰² DICKINSON, *supra* note 3, at 98.

¹⁰³ DICKINSON, *supra* note 3, at 97 (citing, VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE & AUX AFFAIRES DES NATIONS & DES SOUVERAINS).

the same end, even if they disagree on methodology. The primary differences between the two schools is that for the Scholastics most of the *jus gentium* is divinely inspired, while for the Naturalists the law of nations is derived from nature which does not necessarily derive from God.

Further the Scholastics believed that the natural state among nations was one of peace. Although Grotius espoused peace as the natural state among nations, his theory was rejected by Hobbes. For Hobbes, the natural state among nations was one of war as each state, by natural right, strives to ensure its self-preservation. Although this natural state of war exists among states, Hobbes believed that nations would act sociably in relations with one another in order to avoid constant struggle and chaos. Just as man agrees to live in society to gain the benefit of security, so too do nations agree to co-exist in a peaceful status unless wrongfully aggrieved by another.

Vattel gave precision to naturalist theory by expounding on the notion of complete equality among nations in international affairs. Through the 18th century the equality of states was "grounded in natural law, the state of nature, natural equality, and the analogy [of states to man]."¹⁰⁴ Vattel opined that all states under natural law maintained absolute equality regardless of the actual power (militarily or otherwise) of the nation.

Naturalists did not necessarily conceive of the just war concept exactly as the Scholastics (e.g. the initiation of war for vindictive justice), but they saw war as a natural and perhaps necessary element in international relations. Notwithstanding this difference, the naturalists continued to view the *jus ad bellum* as a necessary restraint on the outbreak of belligerency.

¹⁰⁴ DICKINSON, *supra* note 3, at 99.

F. POSITIVISTS, PRAGMATISTS AND THE REJECTION OF JUST WAR

"Because how one lives is so far distant from how one ought to live that he who neglects what is done for what ought to be done sooner effects his end than his preservation."

-Machiavelli

Positivism evolved in the eighteenth century and became the mainstay of international law by the end of the nineteenth century. This school of thought was exclusively concerned with actual international customs and treaties and had little interest in the morality-based just war theory. Positivists rejected Scholastic and natural law doctrines as overly abstract and dogmatic. Positivists argued that the law of nations was not derived from nature, but from the consent or agreement of nations.

Positivists are only concerned with the law as agreed upon by nations, either explicitly or through custom. "The positivist or historical school contended that the principle underlying customs and treaties constituted a positive law of nations, distinct from the natural law and of superior practical importance."¹⁰⁵ The extreme positivist view dictates that states are bound only by rules expressly accepted and effectively enforced.¹⁰⁶

The positivist ideal of law encompasses three ideals: (1) law is external, exercising superior authority over the society or group to be governed; (2) law has an effective enforcement authority; (3) the binding force of law is grounded in a higher government.

Positivists argue that although notions of "civilization" and "humanity" may be valuable to all nations, they do not mean the same thing to all people. Cultural relativism makes the

¹⁰⁵ DICKINSON, *supra* note 3, at 69.

¹⁰⁶ 2 INTERNATIONAL LAW: COLLECTED PAPERS OF HERSH LAUTERPACHT, 5, 30 (E. Lauterpacht ed., 1975)[hereinafter LAUTERPACHT].

naturalists' premise of the "universality of natural law" obsolete and unreasonable.¹⁰⁷

Positivists argue that the law of nations is purely utilitarian and may very well be at variance with the law of nature. "Indeed, it might establish as legally just the things which would be absolutely condemned in the forum of conscience."¹⁰⁸

The majority of modern commentators are of the Positivist school. Therefore, they do not consider just war doctrine to be a part of international law. They focus on the inability of the just war doctrine to give usable objective criteria in differentiating between just and unjust wars: ". . . they place the emphasis upon the absence of differences in the legal effects of just or unjust wars, respectively, upon the crucial vagueness of the whole conception, and upon the nonexistence of a competent tribunal."¹⁰⁹

The dissolution of the Holy Roman Empire after the Thirty Years' War removed from the world community of its only external arbiter of international disputes.

The expansion of the catalogue of just causes highlighted a perplexing problem. For the medieval theologians and canonists, any dispute as to the interpretation or application of the just war doctrine . . . could be resolved authoritatively by the Catholic Church. But when the doctrine was secularized, and absorbed into the mainstream of international law, the absence of an impartial authority-empowered to sift the evidence and apprise the justice of the cause of a concrete war-became readily apparent.¹¹⁰

Objections specific to the Scholastic approach include the fact that religious tenets are unacceptable as a basis for the international law¹¹¹ and, further, "any approach originating in

¹⁰⁷ See, JOHNSON, JUST WAR TRADITION, *supra* note 4, at 112-113.

¹⁰⁸ DICKINSON, *supra* note 3, at 92.

¹⁰⁹ Nussbaum, *supra* note 7, at 473-474.

¹¹⁰ DINSTIEN, *supra*, note 1 at 64-65.

¹¹¹ Although modern international law cannot stand on Christian ideals, it is interesting to note that the modern definition of "civilized international society" is based on standards

a moral philosophy for individuals is bound to prove inadequate in the regulation of international relations.”¹¹²

In sum, Just War theory has been rejected by modern commentators for various reasons.

Chief among them are the following:

1. There are no objective criteria between “just” and “unjust” wars.
2. There is no effective, impartial arbiter to decide, which belligerent has a just cause and who is the “*injustus aggressor*.”
3. There is not an adequate means of enforcing the law.¹¹³
4. The inherent difficulty in discerning between justness of offensive wars (e.g. offensive wars for vindictive justice are accepted, while offensive wars of expansion or aggrandizement are not.).

expressed in 19th and 20th century international law. This law is derived from a body of treaties, customs and arbitration decisions based on extending Western cultural values and other principals to other cultures of the world. In other words, Western cultural hegemony is a means of consensus in the international community. see, JOHNSON, JUST WAR TRADITION *supra* note 4, at 78.

¹¹² Nussbaum, *supra* note 7, at 475. The decline of authority of the Christian church weakened the force of laws of war based on natural or scholastic thought. “. . . the medieval conception of natural law and its relation with positive law is inextricable from credence in the values of Christian faith and the Church as the authoritative promulgator and interpreter of those values. Natural law in this context served to coordinate and unite diverse elements of custom and legal practice across European culture, but it also served to express the point of view of the high morality of which the Church was conservator. . . its base in religiously defined values meant that it could never serve as a unifying force except where those values were present or could be enforced as guides for behavior.” JOHNSON, JUST WAR TRADITION, *supra* note 4, at 72-73. See Schwarzenberger’s community concept of law, *infra* ?. Thus, without the Church drawing the international community together, just war theory lost its authority.

¹¹³ This especially true if the “*injustus aggressor*” is the victor. See Josef L. Kunz, *Bellum Justum and Bellum Legale*, 45 AM. J. INT’L L. 528, 531 (1951).

5. Just war doctrine presumes that nations will act rationally (e.g. right reason under natural law) and morally.
6. Cultural relativism weakens the force and meaning of natural law notions of civilization and humanity.

G. PRAGMATISM

“The existence of a state depends on its capacity for war.”

-Machiavelli

Machiavelli was ahead of his time in that he accurately predicted the central role that power would play in international relations. “[Niccolo di Bernardo] Machiavelli (1469-1527) is usually held to have introduced a new era, the modern era, in the development of political thought . . .”¹¹⁴ He opined that it is natural for states and their rulers to wish to expand and conquer. “War is the most essential activity of political life.”¹¹⁵ For Machiavelli, the sovereign prince held firmly the reigns of power during wartime and was not morally accountable to anyone.¹¹⁶ Political expediency is placed above any notions of morality, charity or humanity.

Machiavelli tied together both political and military institutions. The political governance of a nation was useless without an effective army.¹¹⁷ In the final analysis, Machiavelli

¹¹⁴ Paret, MODERN STRATEGY, *supra* note 25, at 11.

¹¹⁵ *Id.* at 24.

¹¹⁶ John Howard Yoder, *How many Ways Are There to Think Morally About War?*, 11 J.L. & Religion 83, 87 (1994).

¹¹⁷ Machiavelli believed it was necessary to maintain an effective army to ensure a nation’s sovereignty. Nevertheless, he required the sovereign to be responsive to the will of the people in order to maintain an effective army. He believed the necessary prerequisites for an army’s success in war are confidence and discipline. These attributes could only be achieved “where the troops are natives of the same country and have lived together for some time.”

believed that the continued existence of a state rested on the excellence of its army. A nation's political institutions must be organized in such a manner that they create favorable preconditions for the functioning of the military organization.

Pragmatists of the present day supplant Machiavelli's sovereign prince with the modern head of state, responsible only for the well-being of his nation and accountable only to the citizenry of his nation, never to an international community.

The logic of pragmatism is the same today as it was in Machiavelli's time, ". . . it overtly and honestly denies any accountability to or for other loci of value (communities, persons, tribunals, criteria, virtues) outside one's own nation."¹¹⁸

II. LAWS BEFORE JUSTICE-THE PREFERENCE FOR PEACE OVER JUSTICE IN MODERN INTERNATIONAL LAW

As discussed in the preceding section, the growth of the positivist and pragmatist theories in the nineteenth century placed little faith in notions of justice. Relations among nations could only be properly regulated by utilitarian rules that were sanctioned by force. Thus, positive laws began to wholly supplant just war doctrine.

The advent of "total" or absolute" war first witnessed during the Napoleonic Wars at the turn of the 19th century provided the catalyst for development of positive law.¹¹⁹ The *lex*

Paret, *Modern Strategy*, *supra* note 25 at 26. Citizens will be willing to fight and die for their ruler or government only when they are content in the society in which they live.

¹¹⁸ Yoder, *supra* note 116, at 87.

¹¹⁹ Wars in the eighteenth century and before were limited by the following practical factors:
1. limited resources in money, in production, and in manpower; 2. limited aims, often colored by dynastic, territorial and revenue claims, and; 3. an acute awareness of proportionality, "which required the risks they took in pursuit of desired gains not to be so extreme as to cripple them decisively in case of loss, or in the case of achievement should not be so costly as to offset the value of the gain." JOHNSON, *JUST WAR TRADITION*, *supra* note 4, at 192.

lata (codified-written international law) replaced the Scholastic and Naturalist notions of justice which were dismissed as unenforceable and impractical for the regulation of international relations. Although justice was a desirable among nations, it was discarded as unattainable:

. . . the laws of war only began to be codified as *lex lata* among nations (*lex lata*: that which is actually 'laid down' as law, as opposed to *lex ferenda*, that which might be desirable as law) in the nineteenth century. The immediate background of this development was the growth in European society of large national standing armies backed by even larger numbers of trained reserves . .

These developments, which followed the pattern initiated by revolutionary France and Napoleon's wars, marked a great change from the practice of war in the eighteenth century, when such traditional restraints as were generally recognized were reinforced by a state system that while promoting frequent wars, tended to set economic, social, and political bounds to what might be done between belligerents. In the nineteenth century those factors that promoted international hostility still remained, but now the total economic, industrial, and manpower resources of European nations were more directly geared to supporting war. The result was that, when wars did break out, they involved much larger armies than in the previous century, the new weaponry made for a quantum increase in bloodshed and property damage, and the entire process was much more expensive for the belligerents.¹²⁰

The notion of absolute war, exemplified by the Napoleonic Wars, provided the need for change in the regulation of the use of force among nations. "Compared to the century of limited war, or sovereigns' war, before it, the appearance of national war with the French Revolution and the institutionalization of this form of conflict during the Napoleonic Wars stand out starkly."¹²¹

The revolutionary military strategy of Napoleon fueled absolute war. Napoleon was able to raise huge citizen armies through use of the national feeling that prevailed in France after

¹²⁰ *Id.* at 59-60.

¹²¹ *Id.* at 237.

the Revolution. The French *Levee en Masse* provided Napoleon with a ready human resource to prosecute his campaigns in Europe. The political and ideological elements that often drive nations to war changed with the French Revolution.¹²² Napoleon's campaigns through the continent of Europe at the turn of the 19th century brought unprecedented destruction.¹²³ At the Battle of Austerlitz alone, the Austro-Russian coalition army suffered 26,000 casualties.¹²⁴

¹²² Nationalistic fervor was backed by large professional armies that drew freely from the entire nation's population:

Beginning with the French Revolution of 1789 and the wars of the Napoleonic period, certain changes fundamentally undermined the self-limited wars of the ancien regime. Political goals changed to include ideological and nationalistic elements, thereby opening the door to numerous other changes. Strategic concepts enlarged with the political and shifted from stressing control over territory to emphasizing destruction of the enemy forces. Economically, war became based on the entire nation's resources, not the private income of the sovereign. In place of small armies of professional soldiers came large armies made up of conscripts, and the levee en masse, when employed, in theory turned a nation's whole population into combatants . . . While social revolution brought mass armies into being, the industrial revolution equipped them and made them far deadlier than ever before; . . . [I]t released men from civilian occupations so that they could become soldiers without crippling the nation's economy. *Id.* at 282-283.

¹²³ Napoleon's general philosophy of war was simple and to the point. When a state of hostilities existed between France and another power, he would immediately set out to destroy the enemy's field forces by all means available, thus breaking the enemy's will to resist. Napoleon's central tenet of battle lies in this statement, "I only see one thing, namely the enemy's main body. I try to crush it, confident that secondary matters will then settle themselves." From Napoleon the military theorist von Clausewitz derived his dictum that the main object of war is to force your will on the enemy. The most efficient means of accomplishing this goal is through combat directed at the enemy's center of gravity. DAVID G. CHANDLER, THE CAMPAIGNS OF NAPOLEON, 141 (1966).

¹²⁴ STEVEN T. ROSS, EUROPEAN DIPLOMATIC HISTORY 1789-1815: FRANCE AGAINST EUROPE, 253 (1981).

Carl von Clausewitz (1780-1831), a Prussian military theorist, drew from Napoleon's successful military campaigns. His *On War*¹²⁵ revolutionized the way military strategy was viewed and utilized by nations. Clausewitz opined that the purpose of war was to break the will of the enemy, forcing him to act in accordance with the national interests of the victor. According to Clausewitz war in its purest sense is absolute. The complete destruction of the enemy's army is always the goal. The means to this goal is always armed combat.

Pragmatism and positive law are outgrowths of the recognition of the primacy of power in international relations. The international society could only hope to limit the reach of the world's military powers by encoding customary rules of proportionality in war and the sovereignty of nations as absolute.

In the era preceding the two world wars, the concept of just war, the *jus ad bellum*, had virtually disappeared from European warfare. No one called in question the right of states to go to war if their interests seemed to demand it. The absolute sovereignty of nations permitted international armed aggression with little restriction. By the end of the nineteenth century, this almost unrestrained inter-state use of force led to the codification of international laws seeking to lessen the armed conflict.

Figure 1 graphically depicts the evolution of the just war doctrine and international law over time. It is interesting to note the congruence between developments in the just war doctrine and developments in warfare and changes in the international balance of power.

Figure 1: JUST WAR/INTERNATIONAL LAW TIMELINE

¹²⁵ See, CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds. and trans., Princeton University Press 1976).

Ancient -Aristotelian justice -Roman Fetailes	12 th Century -St. Thomas Aquinas -Scholastic Tradition	17 th Cenury -Thirty Years War -End of Feudalism & Holy Roman Empire -Naturalists	19 th Century -Napoleonic Wars -Power Primacy -Pragmatism -Positivism	
337 A.D. -Constantine's conversion -St. Augustine's Just War	16 th Century -Hundred Years' War -Chivalric Code -Rise of Professional Armies		18 th Cenutry -Hobbesian Theory -Absolute Sovereignty	20 th Century -WW I & II -Law over Justice -U.N. Charter

A. LEAGUE OF NATIONS

Twentieth century international law developments¹²⁶ placed into further doubt any continuing vitality of just war theory. The Covenant of the League of Nations did not abolish

¹²⁶ The advent of total war and the heightened destruction it brought, precipitated a movement to regulate inter-state hostilities through the law. The Hague Conventions were the first steps taken to encode international law with the intent of restricting the destruction of war:

The first steps, designed to curtail somewhat the freedom of war in general international law (through multilateral treaties), were taken in the two Hague Peace Conferences of 1899 and 1907. Under Article 2 of the Hague Convention (No. I of both 1899 and 1907) for the Pacific Settlement of International Disputes, contracting parties agreed that, in the case of a serious dispute, before making "an appeal to arm" they would resort ("as far as circumstances allow") to good offices or mediation of Friendly States. The liberty to go to war was circumscribed here in an exceedingly cautious way, leaving to the discretion of the parties the determination whether to employ force or to search for amicable means of settling the dispute." DINSTIEN, *supra*, note 1 at 76-77 (citing, Hague Convention (N. I of 1899 and 1907) for the Pacific Settlement of International Disputes, Hague Conventions 41, 43).

Additionally, Article 1 of the 1907 Hague Convention limited the use of force for the recovery of contract debts. Hague Convention (No. II of 1907): Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Hague Conventions 89. The scope of the these limitations were narrow. First, "war was still permissible if the debtor state refused to go through the arbitration process or abide by its results." Second, "the Convention did not apply to direct inter-Governmental loans and was confined to contractual debts of foreign nations (whose claims were espoused by the respective governments)." DINSTIEN, *supra*, note 1, at 77 (citing, G.W. Scott, *Hague Convention Restricting the Use of Force to Recover on Contract Claims*, 2 AM. J. INT'L L. 78, 90 (1908)).

The Hague 1907 convention introduced the idea of "service to humanity" as a goal of international law.

The Preamble declares the High Contracting Parties to be . . . animated by the desire to serve, even in this extreme case [of war], the interest of humanity

war, but discriminated between different types of war. The basis of the distinction was not, as in the classic doctrine, between just and unjust wars, but between legal and illegal wars.

The concept of *bellum legale* replaced the concept of *bellum justum*.

In all, the Covenant did not abolish the right of States to resort to war. Subject to specific prohibitions . . . war remained lawful. If looked at from a complementary angle of vision, one could easily discern a number of "gaps" in the legal fence installed by the Covenant around the right of States to resort to war. The "gaps" opened the legal road to war . . .¹²⁷

and the ever progressive needs of civilization.' Though an innovation in 1907, this notion caught on, and it finds expression again and again in the twentieth century-in the Nuremberg trials, the 1949 Geneva Conventions for the Protection of War Victims, in the United Nations Declaration of Human Rights. It can be argued . . . that this is the point of entry into international law of the concept of a humanitarian law. It is also possible to trace such a concept to the latent influence of charity in the just war tradition. JOHNSON, IDEOLOGY, *supra* note 6, at 262 n.1.

¹²⁷ DINSTIEN, *supra*, note 1 at 79 (citing, A. MOLLER, 2 INTERNATIONAL LAW IN PEACE AND WAR 88 (H.M. Pratt trans., 1935), and J.B. Whitton, *La Neutralite et la Societe des Nations*, 17 R.C.A.D.I. 453, 479-90 (1927)).

Examples of the "gaps" in the League Covenant are as follows:

- (1) Article 15(7) of the Covenant required unanimity in the Council or a proper majority in the Assembly, excluding the members to the dispute, before the Council's or Assembly's arbitrated recommendations could be binding. In the absence of the above prerequisites, the parties retained their freedom of action.
- (2) Under Article 15(8), the Council or Assembly lacked jurisdiction over matters that came within the domestic jurisdiction of the dispute. Therefore, "an international war could be triggered by a dispute which was ostensibly non-international in character.
- (3) It was implied in Article 12 that, if the Council (or the Assembly) did not arrive at a recommendation within six months-or, alternatively, if either an arbitral award or a judicial decision (the Covenant established the World Court) was not delivered within a reasonable time-the parties would be free to take any action that they deemed fit." *Id.* at 79 (parenthetical added).
- (4) Failure to comply with a arbitral award, a judicial decision, unanimous recommendation of the Council, or an Assembly recommendation based on the required majority, could result in war against, or by, the non-complying nations.
- (5) The Covenant only applied among member states. It did not apply to disputes between member and non-member states, nor did it apply to disputes between two non-member states. In the event of the a non-member dispute, Article 17 provided that the non-member states would be invited to accept the obligations of membership. The non-member state was free to accept or decline the invitation.

A major weakness of the Covenant was the requirement of unanimity of all its members before action could be taken. This limitation would often lead to inaction in response to state aggression. Further, the Covenant did not apply to non-members. In the end, the Covenant had too many holes and lacked teeth. Forceable intervention short of war could be embarked upon with impunity. A nation's resort to armed force could easily be justified within the parameters of the Covenant.

B. KELLOGG-BRIAND PACT

The Kellogg-Briand Pact (named for the American Secretary of State and the French Foreign Minister) of 1928, was a watershed in the regulation of the use of force among nations.¹²⁸ The Kellogg-Briand Pact, entitled the "General Treaty for the Renunciation of War as an Instrument of National Policy," was signed in Paris.¹²⁹

The Kellogg-Briand Pact comprised of only three Articles, so its objective of outlawing war was clear:

The Kellogg-Briand Pact comprised of only three Articles, including one of a technical nature. In Article 1, the contracting parties solemnly declared that 'they condemn recourse to war for the solution of international controversies, and renounced it as an instrument of national policy in their relations with one another.' In Article 2, they agreed that the settlement of all disputes with each other 'shall never be sought except by pacific means'. With the Kellogg-Briand Pact, international law progressed from *jus ad bellum* to *jus contra bellum*.¹³⁰

¹²⁸ DINSTIEN, *supra* note 1 at 81.

¹²⁹ "Before the outbreak of the Second World War, the Pact had 63 contracting parties, a record number for that period." *Id.* at 81 (citing 33 AM. J. INT'L L., Sp. Supp. 865 (1939)).

¹³⁰ *Id.* at 81 (citing C. DE VISSHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 63n.1 (1957), and, M. HOWARD, TEMPERAMENTA BELLI: CAN WAR BE CONTROLLED?: RESTRAINTS ON WAR 1, 11 (1979).

Even under the general prohibition of the Pact, recourse to war remained lawful under the following circumstances:

- (1) A war of self-defence. ". . . formal notes reserving the right of self-defence were exchanged between the principal signatories prior to the conclusion of the Pact, and there was never any doubt that the renunciation had to be construed accordingly."¹³¹ The parameters of self-defense were not addressed in the Pact, however it is a reasonable interpretation that it allowed for collective self-defense in response to unwarranted aggression.¹³²
- (2) Although the Pact outlawed war as an instrument of national policy, it did not outlaw war as an instrument of international policy. This led to an interpretation which permitted recourse to war to maintain international law.¹³³
- (3) As under the Covenant, recourse to war was preserved against non-contracting parties.
- (4) Forceable means short of war were not addressed and assumed to be lawful.

The Kellogg -Briand Pact failed to effectively regulate the use of force among nations for many of the same reasons as the Covenant. The use of force short of war was presumed to be lawful because such conduct had been the nature of international state practice since the eighteenth century. Further, as with the Covenant, nations not a party to the Pact were excluded from its purview.

The Covenant and Pact failed largely because there was no effective external governing body to implement the law. The requirement for this external mechanism is one of the

¹³¹ *Id.* at 82 (citing 22 AM. J. INT'L L., Supp. 109-13 (1928), and, 23 AM. J. INT'L L., Supp., 1-13 (1929)).

¹³² *Id.* at 82.

¹³³ See, HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 43 (1952).

necessary factors for positive law to be effective. In the end, nations resorted to the use of force in much the same way they had in the previous three centuries: without limitation.

C. UNITED NATIONS

There are four primary improvements of the UN Charter over the Covenant of the League and the Kellogg-Briand Pact:

1. The League required unanimity of all members for action, while the Charter requires only unanimity of the Permanent members of the Security Council;¹³⁴
2. The UN is a separate entity from that of its members. The International Court of Justice has been established as the judicial organ of the international community;¹³⁵
3. The UN Charter prohibits the recourse to force or threats of force for the settlement of disputes.¹³⁶ The Covenant did not address the use of force short of war;
4. The Charter provides for the enforcement of its Articles¹³⁷ and is accepted international law by all nations.¹³⁸

¹³⁴ Article 27, United Nations Charter. See, GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 213 (1949) [Hereinafter GOODRICH & HAMBRO].

¹³⁵ Chapter XIV, United Nations Charter. See *Id.* at p. 476.

¹³⁶ Article 2(4) of the Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.* at 102.

¹³⁷ Chapter VII, United Nations Charter. See, *Id.* at 262.

¹³⁸ Article 2(6) of the United Nations Charter states: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security. *Id.* at 108.

Recognizing the shortcomings of the League Covenant and the Kellogg-Briand Pact, the United Nations Charter was drafted with an acute sense that all armed force, not only war, had to be regulated and restricted: "When the Charter of the United Nations was drafted in San Francisco, in 1945, one of its aims was redressing the shortcomings of the Kellogg-Briand Pact. The pivot on which the present-day *jus ad bellum* hinges is Article 2(4) of the Charter . . ."¹³⁹

Article 2(4) of the Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹⁴⁰

It is important to note that Article 2(4) avoids the term "war". The Covenant prohibited the "resort to war," ostensibly meaning that the use of armed force short of war was permitted. Article 2(4) was drafted to specifically close this gap. Article 2(4) goes further and prohibits the "threat" of force in international relations.

There is continuing debate regarding the definition of the term "force" as used in Article 2(4).¹⁴¹ While the intent of the drafters is not explicit, common usage and the context in

¹³⁹ DINSTIEN, *supra*, note 1, at 83-84 (citing, R. Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239-268 (1988)).

¹⁴⁰ GOODRICH & HAMBRO, *supra* note 134, at 102.

¹⁴¹ Although the word "force" is not defined in the UN Charter, General Assembly Resolution No. 3314 (1974) defines "aggression." It appears as if the purpose of this resolution was to give nations guidelines for determining the legality of their actions. To accomplish the task of defining aggression the Assembly utilized a two-part technique. First, defining aggression in general terms and then appending a non-exhaustive list of illustrations. Article 1 embodies the general definition:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations, as set out in this

which the term is used strongly suggest that the word "force" as used in the article is to be defined as "armed force" or "physical force."¹⁴²

Further, Article 2(3)¹⁴³ requires all Members to settle their international disputes by peaceful means "in such a manner that international peace and security, and justice, are not endangered."¹⁴⁴

Unlike the Covenant and the Pact, the prohibition on the use of force among nations applies to non-member nations as well. This is addressed in Article 2(6): "The Organization

definition. In an explanatory note, the framers of the Definition commented that the term "State" includes non-UN Members, embraces a group of States and is used without prejudice to questions of recognition.

The enumeration of specific acts of aggression appears in Article 3. Under the Article, the following amount to acts of aggression ("regardless of a declaration of war"):

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An armed attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. DINSTIEN, *supra*, note 1 at 125-128, citing General Assembly Resolution No. 3314 (XXIX), 29(1) RGA 142, 143 (1974).

¹⁴² GOODRICH & HAMBRO, *supra* note 134, at 104.

¹⁴⁴ DINSTIEN, *supra*, note 1 at 85.

shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”¹⁴⁵

Some theorists argue that states continue to use force in violation of the Charter, often with impunity. The continued use of force by nations in contravention of Article 2(4), however, does not mean the destruction of the international norm contained in that article.

In what ever way States understand or misunderstand the right to resort to the use of force, none are prepared “to uphold the proposition that there are no legal restraints whatever on the employment of inter-State force. ‘No state has ever suggested that violations of article 2(4) have opened the door to free use of force’.”¹⁴⁶

¹⁴⁵ Goodrich & Hambro, *supra* note 134, at 108. Article 2(6) makes clear that the United Nations assumes authority over nations who have not consented to the Charter. Further, Article 103 of the Charter provides: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” *Id.*, at 517.

¹⁴⁶ DINSTIEN, *supra*, note 1 at 96.

This point was articulated well by the ICJ in the Nicaragua case:
It is not be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force . . . The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained in the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. DINSTIEN, *supra* note 1 at 96 (citing, Military and Paramilitary Activities (Nicar. v. U.S.) (Merits), 1986 ICJ).

The International Law Commission identified the Charter's prohibition on the use of interstate force as "a conspicuous example of *jus cogens*."¹⁴⁷ This same statement has been advanced in international treatises.¹⁴⁸

¹⁴⁷ Report of International Law Commission, 18th Session, [1966] II ILC Ybk 172, 247. There are four categories of international law norms and a fifth non-legal obligation. They are: 1. custom, 2. treaty, 3. general/equitable principles (controversial sources, equity principles often arise in maritime boundary cases), 4. preemtory norms (*jus cogens*-higher customary law). The argument is made that *jus cogens* is binding on nations without their consent, citing Art 53 of the 1969 Vienna Convention on Treaties as authority. How customary law becomes *jus cogens* is unsettled. It must at a minimum pass the normative tests for rules of "general international law." It must also be accepted and recognized as a preemtory norm by the international community as a whole); and 5. soft law (certain rules may be non-legal obligations. They are political or moral. e.g. certain humanitarian laws.) Johnathan I. Charney & Gennady M. Danilenko, *Consent and the Creation of International Law*, in BEYOND CONFRONTATION: INTERNATIONAL LAW FOR THE POST-COLD WAR ERA, 23, 33 (Lori Fisler Damrosch et al. eds., 1995)[hereinafter Damrosch, BEYOND CONFRONTATION].

"Custom and norms are accepted by:

1. An express statement by the state accepting the norm as binding upon it;
2. Acceptance of the norm manifested by conforming practice taken in pursuance to the norm; and
3. Acceptance of a norm effected by acquiescence." *Id.* at 34.

Treaties are normally ratified through explicit consent: "the basic rules of international law relating to treaties emphasize the fact that this source of law requires the consent of the participating parties." Article 11 of the 1969 Vienna Convention, entitled "Means of Expressing Consent to be Bound by a Treaty"-- "provides that consent may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession." *Id.* at 38-39.

Generally, successor states are not bound by the treaties executed by the predecessor state. The rules regarding successor states are codified in the Vienna Convention on Succession of States in Respect of Treaties. They clearly recognize as a general rule the requirement of the consent of the successor state to treaties in force for the predecessor state. However, a significant exception is provided with respect to treaties relating to territories. In such circumstances the obligation of the predecessor state continues even in the absence of successor state consent." *Id.* at 39 (citing Vienna Convention on Succession of States in Respect of Treaties, art. 5, UN doc A/Conf. 80/31 n.52, art. 16 and art. 30 (1979)).

¹⁴⁸ AMERICAN LAW INSTITUTE, 1 RESTATEMENT OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES 28 (1986) states as follows: *Preemptory norms of international law (jus cogens)*. Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law

Further, Article 2(4) cannot be contravened through treaties of aggression. This fact is apparent in the 1969 Vienna Convention on the Law of Treaties. Article 53 of the Vienna Convention addresses the force of *jus cogens*. Under Article 53 of the Vienna Convention, “[a] treaty is void if at the time of its conclusion, it conflicts with a peremptory norm of general international law.” For a norm to qualify as peremptory, it has to be one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁴⁹

The blanket prohibition against the use of force in international relations is subject to two exceptions: Collective security (Article 42) and self-defense (Article 51).

Before embarking on an analysis of the appropriate application on the UN Charter’s limitation on the use of force, it is important to understand what is meant by “international law.”

D. DEFINING INTERNATIONAL LAW

According to international theorist Georg Schwarzenberger, defining law and justice depends on the type and character of human association in which they operate. He recognizes three types of human associations: community, society and a hybrid, combining elements of each.

having the same character. *It is generally accepted that the principles of the United Nations Charter prohibiting the use of force . . . have the character of jus cogens.*” (emphasis added).

¹⁴⁹ DINSTIEN, *supra*, note 1 at 101. What differentiates *jus cogens* from customary international law (*jus dispositivum*), is the peremptory nature of the former. Where customary law enjoins nations from acting in violation of its norms, *jus cogens* invalidates any action taken in contradiction to its direction. “The preemptory nature of the injunction signifies that the contractual freedom of States is curtailed.” *Id.* at 102. *Jus cogens* can only be modified by a contrary modification in the customary conduct of states that itself becomes peremptory in nature.

A community differs from a society in that a community is an end in and of itself, whereas a society is a means to an end. To be more specific, the members of a community are united in spite of individual differences, working toward the continual and perpetual integration of the group. Examples of communities would be a family or a church group.

Societies are formed to achieve a goal. An individual's worth in a society is the power he brings to the group. To illustrate this point Schwarzenberger quotes Hobbes' *Leviathan*: "The value, or worth of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependent on the need and judgment of another."¹⁵¹ Examples of societies are a joint-stock company or the international society. Individuals operating within a society do so through parochial power politics.

Schwarzenberger recognizes that in actual practice communities and societies do not exist as a pure groups, but as hybrids. Individual nations maintain characteristics of both community and society.¹⁵²

As was stated above, the use made of law and justice depends on the type of human association being governed. Law in society is the law of power. Law in communities is characterized by co-ordination. Hybrid groups operate within the law of reciprocity.¹⁵³

¹⁵¹ Georg Schwarzenberger, *The Three Types of Law*, 53 ETHICS 89, 89 (1943)(citing, HOBBES, LEVIATHAN, Part I, chap x).

¹⁵² Schwarzenberger also points out that man lives simultaneously in a number of communities and societies, and thus displays different attitudes in each according to its purpose.

¹⁵³ "In Schwarzenberger's terminology, community law, the law of coordination, stands alongside two other types of law understood in terms of their function: the law of power, in which a dominant social group enforces its values on other groups by the use of some sort of power, and the law of reciprocity, where two or more social groups possessing different

Schwarzenberger describes the function of law in societies as follows: "The function of a society law which is characterized by gross disparities in rights and duties may be defined as the stabilization of a relationship of power. This kind of law provides one of the three fundamental types of law: *the law of power.*"¹⁵⁴

The UN Charter recognizes the primacy of power in relations among nations. This is apparent with the ability of any of the permanent members of the Security Council to block UN action with use of the veto. It has been noted that:

The salient feature of [the UN Charter] is that the Great Powers, on condition that they act in concord and achieve unanimity, have, in effect, the decisive power and the decisive responsibility for enforcing the peace-except when they themselves happen to be the law breakers. It was possible both to approve of and to criticize the Charter on 'realistic' grounds. Its draftsman and supporters said repeatedly: The Charter is a highly realistic instrument. It acknowledges that the equality of all Members is a useless notion for the purpose of maintaining peace; that responsibility and rights must be commensurate with power; that the Great Powers have the power; that their unity and concord are the safest, and the only guarantee of peace; that no legal machinery will be of the slightest use if they fail amongst themselves; and that, therefore, the so-called veto, although open to abuse, is the only realistic solution of the problem of international organization.¹⁵⁵

In contrast to the power relationship between members in societies, the law within communities serves the purpose of maintaining, protecting and continually integrating the group. Even in tight-knit communities certain situations arise in which common norms and morals must be supplemented and supported by the law. The larger the community, the more need for law. Schwarzenberger describes the law operating within communities as the law

values (and different laws, as a result), 'trade off' inferior values so as to protect and conserve those which are higher." JOHNSON, JUST WAR TRADITION, *supra* note 4, at 73-74) (citing GEORG SCHWARZENBERGER, THE FRONTIERS OF INTERNATIONAL LAW, Chap I (1962)).

¹⁵⁴ Schwarzenberger, *supra* note 151, at 91.

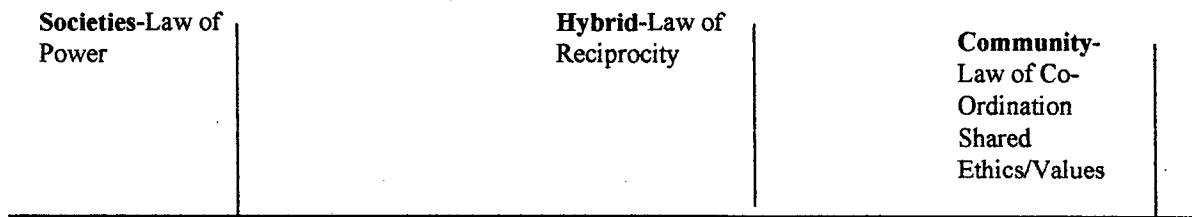
¹⁵⁵ Lauterpacht, *supra* note 106, at 55.

of co-ordination. Co-ordinating law within a community is designed to bring the community together. "Its function consists in promoting the best co-ordination of efforts and activities in the interest of the community."¹⁵⁶

In hybrid groups, the law of reciprocity applies. Schwarzenberger recognizes that mankind is not predominantly altruistic and is prepared to act on the basis of the *quid pro quo*. "The law of reciprocity may be considered as a compromise between the laws of power and of co-ordination, between the extremes of brutal domination and superhuman self-negation."¹⁵⁷

The different types of law as described by Schwarzenberger can be graphically depicted as continuum as follows:

Figure 2: LAW CONTINUUM



Justice and law are defined by the group which they apply. It is difficult to accurately and precisely define these terms in without context. Both law and justice are autonomous (self-

¹⁵⁶ Schwarzenberger, *supra* note 151, at 92.

¹⁵⁷ *Id.* at 94.

governing) and heteronomous (being under the rule or authority of another) in nature. The more integrated a group becomes, the stronger is its autonomous nature and vice versa. Therefore, communities operating under the law of co-ordination are relatively self-governing and need few laws, while societies based on power, need close governance and detailed laws. For example, the rules which govern the day-to-day interaction of family members are usually simple and unwritten. In contrast, the regulation of the day-to-day activities of a prison inmate population tend to be detailed and codified.

The autonomous nature of law within communities grows not from the letter of the law, but from the supremacy of certain ethical convictions and certain rules of decency that are prevalent in the community. This supremacy of shared-convictions and beliefs is reinforced by the fact that those in power positions within the community share the same convictions. Thus in a democratic republic, the citizenry accept the rule of law because its legislatures must be responsive to the constituency, or face defeat at the election polls. The law must change with the values of the community.¹⁵⁸

Although the character of international law is based on an amalgam of the law of co-ordination and power, power reigns supreme in the international society. As Schwarzenberger states: "As the rule of law in the international society is conditioned by the arbitrament of force, primarily international law is a law of power."¹⁵⁹

Within the international society, nations often do not possess shared ethical convictions. Most nations possess a very limited ability to effect change in international law. To move toward the law of co-ordination, the international community must accept the binding and

¹⁵⁸ Julius Stone, *Law, Force and Survival*, 39 FOREIGN AFFAIRS 549, 550 (1961).

¹⁵⁹ Schwarzenberger, *supra* note 151, at 97.

adjudicative power of the world governing organization, the United Nations. Acceptance of such power, however, requires the relinquishment of some state sovereignty.

A complete acceptance of the governing power of the UN will may never be realized to the extent needed to develop co-ordinated law among nations. This is certainly the case in the present international environment. Certain interests of nations are perceived to be so vital that disputes over those interests are non-justiciable. "If in the view of one or both of the disputant states the interests at stake are so important as to override any condition of the law."¹⁶⁰

Nations are willing to relinquish state sovereignty to a world organization only to the extent that their vital interests are protected. When faced with compromising vital interests or complying with the rule of international law, nations will choose the former. "State sovereignty is not a sacred cow; but neither is it just a piece of abstract fanatical lunacy produced by human greed or madness. It still corresponds to certain interests on which peoples, rightly or wrongly, continue to insist, even at the cost of life."¹⁶¹

E. INTERNATIONAL LAW AND SOVEREIGNTY

International law is based on the consent of nations. This notion is grounded in the idea that sovereignty is preeminent in international relations. This international law tenet is reflected in the Article 38 of the Statute of the International Court of Justice. Under Article 38, the ICJ is to decide disputes submitted before it applying the following authority: "1. international conventions, whether general or particular, establishing rules expressly recognized by consenting states;

¹⁶⁰ Stone, *supra* note 158, at 551.

¹⁶¹ *Id.* at 551-552.

2. international custom, as evidence of a general practice *accepted as law*;
3. the general principles of law *recognized by civilized nations . . .*" (emphasis added)¹⁶²

This interpretation of consent of nations was recognized by the Permanent Court of International Justice in the *Lotus* case¹⁶³: "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."¹⁶⁴

The ICJ in the *Nicaragua* case expressed the same principle: ". . . in international law there are no rules, other than such rules as may be accepted by the states concerned, by treaty or otherwise."¹⁶⁵ The doctrine of absolute state sovereignty is also recognized by most international law commentators: "It may be safely assumed that all or at least the overwhelming majority of states would, as a general proposition, deny that they could

¹⁶² Damrosch, BEYOND CONFRONTATION, *supra* note 147, at 23 (citing, Statute of the International Court of Justice, art. 38(b), 59 U.S. Stat. 1055).

¹⁶³ This case involved an at-sea collision between the French steamer *Lotus* and the Turkish collier *Boz-Kourt*. The collision resulted in the sinking of the Turkish vessel with loss of life. A Turkish Court sitting in Constantinople tried the officers-in-charge of both vessels under the Turkish penal code and convicted them of manslaughter. The French government objected to the jurisdiction of the Turkish court under international law. The Permanent Court of International Justice (operating under the League of Nations), in a six to five decision, held that no rule of international law forbade the Turkish court from assuming jurisdiction. The majority of the court assimilated the Turkish vessel to Turkish territory under the principle of "objective territorial jurisdiction." It should be noted that the dissent in the *Lotus* case, denying jurisdiction of a domestic court over a foreign-flagged vessel, has been encoded in international law under the Geneva Convention of 1952 for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collision or other Incidents of Navigation. see BRIERLY, *supra* note 68, at 302-304.

¹⁶⁴ S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, 18.

¹⁶⁵ Military and Paramilitary Activities in and Against Nicaragua (Merits) (Nicaragua v. United States), 1986, ICJ 135.

become bound by a rule of international law which was not accepted by them in one form or another.”¹⁶⁶

It cannot be denied that the state sovereignty has attained a very elevated and protected status in international law. A brief history of the development of the doctrine of sovereignty will be helpful to better understand the importance it is given.

The doctrine of sovereignty has its roots in the disintegration of the feudal system at the end of the Middle Ages. At the end of the Reformation, unified states emerged from the multitudes of vassal states and kingdoms that existed during the feudal era.¹⁶⁷ The notion of state sovereignty was first formulated by Francis Bodin in 1576 in his *De Republica*. Bodin recognized that a state needed a unified government to be effective. This unified government, represented by the monarch, held the power to make law. This did not mean to say that the monarch was above the law, since he alone formulated the law. To the contrary, the monarch was bound by divine law to exercise his power in accordance with right reason and justice.¹⁶⁸

With the fall of the Holy Roman Empire in the seventeenth century, the barriers against absolutism gave way. Strong monarchical governments possessing unchecked power evolved. This led Hobbes to opine in his *Leviathan* to opine that power, not law, makes the sovereign.¹⁶⁹ Thus, the sovereign ruler was not restricted by law, but by the limits of his own power. Identifying sovereignty with power, instead of legal right had the effect of removing it from the sphere of jurisprudence and placing it the realm of the political.¹⁷⁰

¹⁶⁶ Damrosch, BEYOND CONFRONTATION, *supra* note 147, at 24.

¹⁶⁸ BRIERLY, *supra* note 68, at 8-10.

¹⁷⁰ BRIERLY, *supra* note 68, at 13.

Logically, the end result of identifying sovereignty with absolute power, is to make sovereign states above the law. This circumstance led to the unrestrained ability of nations to judge their own international disputes resorting to armed force when deemed necessary. Thus, the doctrine of sovereignty has placed a serve limitation on the external rule of law among nations: "The fundamental difficulty of subjecting states to the rule of law is the fact that states possess power. The legal control of power is always difficult . . ."¹⁷¹

The absolute sovereignty of nations is reflected in Article 2(1) of the United Nations Charter. This article states: "The Organization is based on the principle of the sovereign equality of all its Members."¹⁷² Although the term "sovereign equality" is not self-explanatory, it has been invoked by nations to restrict the expansion of international law as a violation of state independence:

" . . . it has served to emphasize the fact that the United Nations is an international organization to facilitate voluntary cooperation among its Members, and has been invoked by those Members desirous of checking any development of the United Nations . . . at the expense of national freedom of action."¹⁷³

The importance of national sovereignty is echoed in Article 2(4)'s prohibition against the use or threat of force against the "territorial integrity or political independence of any state."

¹⁷¹ *Id.* at 48. Some theorist espouse the "auto-limitation of sovereignty" which argues that states are sovereign persons, possessed of wills to reject all external limitation. These theorists conclude that international law is binding only because, and so long as, it consents to be bound." *Id.* at 53.

¹⁷² GOODRICH & HAMBRO, *supra* note 134, at 98. According to drafting committee reports on article 2(1) sovereign equality includes the following: (1) that states are juridically equal; (2) that each state enjoys the right inherent in full sovereignty; (3) that the personality of the state is respected, as well as its territorial integrity and political independence; (4) that the state should, under the international order, comply faithfully with its duties and obligations.

¹⁷³ *Id.* at 100.

Further, Article 2(7)¹⁷⁴ prohibits the United Nations from intervening in the domestic matters of a state, except for collective action taken under authority of Chapter VII.

F. JUSTICE AND THE LAW

What we are seeking is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform.

Justice Cardozo
-The Growth of the Law

Justice is often held to be in conformity with the law. To achieve proper law, however, law must conform to justice. Justice is the goal of law. Justice Cardozo stated, "What we are seeking is not merely the justice that one receives when his rights and duties are determined by the law as it is; what we are seeking is the justice to which law in its making should conform."¹⁷⁵ This raises the issue of defining justice.

The concept of "justice" is one that has been scrutinized since ancient times. One constant in the study of justice is the consensus that its nature is essentially social. "Justice in its true and proper sense is a principle of co-ordination between subjective beings."¹⁷⁶ Before 500 B.C. the Greek philosopher and mathematician Pythagoras formed a concept of

¹⁷⁵ CARDOZO, THE GROWTH OF THE LAW 87 (1927).

¹⁷⁶ GIORGIO DEL VECCHIO, JUSTICE: AN HISTORICAL AND PHILOSOPHICAL ESSAY 2 (A.H. Campbell ed., 1952). Although the etymology of the Latin "*jus*" is not settle, it is widely held that it is derived from the Sanskrit (ancient Indic literary and religious language, c. 1200 B.C.) root *ju* (*yu*), which means "to bind." Similarly, the word "deontology" (the branch of ethics dealing with duty, moral obligation, and right action), is derived from the Greek "deont," meaning that which is binding. THE RANDOM HOUSE COLLEGE DICTIONARY 356 (1980).

justice that equated justice with equality. The essence of Pythagoras' theory of justice is the is requital of the harmed party.¹⁷⁷

Aristotle expounded on the Pythagorean notion of justice, breaking it into its basic elements and categorizing justice according to the society in which it exists. The basic elements of justice are: bilaterality, parity and reciprocity. These elements exist concurrently, complementing each other. Although loosely defined, these terms provide valuable benchmarks in determining the essence of justice. Bilaterality belongs to every juridical determination, suggesting the simultaneous consideration of several subjects place ideally on the same plane. Parity, presupposes equality among those participating in mutual relations. Reciprocity suggests balance. No claim can be made free of a corresponding obligation.¹⁷⁸

These elements are present, to a greater or lesser degree in all forms of justice. There are many forms of justice,¹⁷⁹ two of which will be discussed more fully here. Aristotle believed

¹⁷⁷ DEL VECCHIO, *supra* note 176, at 42. Even the most primitive human groups live together via a strict ideal of the necessity for mutual respect according to some standard of equality or proportion. "The typical example of primitive formulations is given to us by the famous Biblical maxims: "He that killeth any man shall surely be put to death. And he that killeth a beast shall make it good; beast for beast . . . Breach for breach, eye for eye, tooth for tooth . ." *Id.* at 93.

¹⁷⁸ *Id.* at 83.

¹⁷⁹ The following are examples of different types of justice:
Contributory justice-exacts and equal division of burden for a common purpose, but exempts from tax the essential items needed to exist.
Social justice-states that society should protect the morality and physical integrity of each of its members, especially those who are not able to provide for themselves.
Economic justice-regulates the distribution of wealth to at least allow the opportunity for all members of society to be productive.
Educative justice-allows for equal access to educational resources based on capability.
Rewarding justice-all members of society should be rewarded, appreciated and chosen for higher position according to merit.

that in order to achieve true justice, the individual, or self, had to be subordinated the subjective standard of the community.¹⁸⁰ According to Aristotle, the highest form of justice is distributive justice.¹⁸¹ This form of aims at giving each member of the community a proportionate share of the honors and goods available according to merit. Because individuals should act selflessly for the sake of the community,¹⁸² distributive justice could not be criticized as inequitable.¹⁸³

Aristotle recognized a lower form of justice that he termed "equalizing" or "corrective" justice. Here, individuals of a community share based on wholly objective criteria. Equalizing justice is explained in this way: ". . . bringing each of two parties who meet in a relation in to a state of equality with regard to the other, so that neither shall have given or received either more or less."¹⁸⁴ According to equalizing justice, the elements of parity and

Penal or Reparative justice-the power of society to require reparation for harm willfully or culpably caused.

International justice-this form of justice covers all of humanity, requiring each State to promote and maintain cooperation and the free co-existence among them. This form of justice cannot be attained until the principles of justice are first applied to the members of each individual nation. *Id.* at 119-121.

¹⁸⁰ Aristotle's concept of justice encompassed the idea of *alterias*. This is a metaphysical concept which states that the essence of justice is achieve where an individual posits himself as an object in relation to others, recognizing himself as an element in a network of interrelations between individuals. There is ". . .an *objective consciousness of self*, whereby the subjective self becomes co-ordinated with other selves." *Id.* at 80.

¹⁸¹ The notion of proportional equality according to merit, gave meaning to the maxim that everyone should be assigned that which belongs to him. This maxim was laid down as the basis of Aristotle's jurisprudence. *Id.* at 55.

¹⁸² Here against is the concept of co-ordination as used in defining the law of communities. See "defining law" *supra* at ?. "Justice in its true and proper sense is a principle of co-ordination between subjective beings." *Id.* at 2.

¹⁸³ *Id.* at 52.

¹⁸⁴ *Id.* at 52.

reciprocity have primacy. For example, equalizing justice would require and exact correspondence between an offense committed and the punishment given.¹⁸⁵

Equalizing justice can further subdivided into communicative justice and judicial justice.¹⁸⁶ Each of these exists in a society operating under the notion of equalizing justice. Communicative justice suggests a voluntary social, written or verbal contract between parties of the community. In the case of a dispute, the parties to the contract voluntarily submit to the decision of a neutral arbiter.

In comparison, judicial justice, applying the element of reciprocity, requires requital of harms unjustly committed. Making reparation against the will of one party for harm unjustly

¹⁸⁵ Aristotle considered penal justice to more private than public. Its sole function was the reparation of harm done to the victim. Aristotle did not address in detail the difference between reparation of damage and punishment. *Id.* at 52-53.

¹⁸⁶ *Id.* at 52.

inflicted on another is the essence of judicial justice.¹⁸⁷ Reparative justice, is derived from judicial justice, seeking to make an injured party whole by taking reparation against the party culpably responsible for the injury.¹⁸⁸

Judicial and reparative justice form the basis the Scholastic just war criteria of necessity, proportionality, charity and the requirement to request reparation from the culpable party before resorting to the use of force.¹⁸⁹ Del Vecchio notes that: "The influence of the Platonic-Aristotelian doctrine is revealed . . . more directly in the Scholastic philosophy, especially in the work of Aquinas . . ."¹⁹⁰ The Scholastics affirmed justice as a higher general virtue because it lends itself to reason and encompassed not only the actions of the individual, but also the individual's interrelations with others.

The Aristotelian notion of distributive justice remains a lofty goal, unattainable by most groups. Most larger communities and societies apply Aristotle's notion of equalizing justice. It allows for the delineation of objective standards applicable to all. These objective standards provide the means by which society can judge the actions of its members. The standards are designed to protect individual within the society,¹⁹¹ while simultaneously reinforcing the unity of the society.

¹⁸⁷ *Id.* at 52.

¹⁸⁸ *Id.* at 121.

¹⁹⁰ *Id.* at 24.

¹⁹¹ Natural law theorists (see *supra*, p?) recognize the following individual rights: first, each individual possesses the natural right to liberty; second, there is perfect equality among individuals; third, every individual may claim respect for his own physical and moral integrity; fourth, individuals come together in societies or communities according to a tacit or implicit "social contract" whereby each agrees to respect the rights of others, and; fifth,

Thus, according to equalizing justice, the deontological value of law lies in the protection of individual natural rights considered as an organic whole. In other words, obligations of individuals in society vis-à-vis each other derive from the need to protect individual rights. Reciprocity is the key element binding individuals in a society together. Del Vecchio notes this circumstance as follows: "Historical experience-as everyone knows-displays men only as living together, and thus bound to one another in a web of reciprocal relations."¹⁹²

It is also observed that as societies become more integrated, the focus shifts from protecting the individual to binding the community together.¹⁹³ "Human life . . . cannot develop through mere mechanical encounters or collisions, nor through acts of unilateral will, but only in so far as different individuals deal with one another and co-operate for the same end, submitting their own conduct to a common rule and restraint."¹⁹⁴ It may be said, therefore, that the development of law and justice in society go hand-in-hand.

To expand on the discussion of the different types of law, hybrid societies operate under the law of reciprocity. As already discussed, reciprocity is a key element in equalizing justice. As societies become more integrated, the law of co-ordination may be embraced, focusing on further binding the community. Since, under the theory of co-ordinating justice,

consent is given to the sovereignty of the society or community to regulate intercourse between individuals. *Id.* at 117-118.

¹⁹² *Id.* at 91.

¹⁹³ Del Vecchio calls this evolution the "metegoistic character" of societal development. This suggests the overcoming of individuality and the "trans-subjective linking and interweaving of individuals in society. *Id.* at 92.

¹⁹⁴ *Id.* at 92.

primary concern is given to the community and not the individual, the distributive form of justice can be applied without upsetting the rights of the individuals in the community.

Juxtaposing justice on the law continuum may be graphically depicted as follows:

Figure 3: LAW CONTINUUM JUXTAPOSING JUSTICE

Societies-Law of Power	Hybrid-Law of Reciprocity	Community-Law of Co-Ordination Shared ethics/values
Unequal justice/Victor's Justice/No Justice	Equalizing justice -juridical -reparative -communicative -corrective (requital) -Just War-proportionality, necessity, charity (civility), volitional justice	Distributive justice- subordination to community. Co-ordination btw subjective beings

This discussion of justice leads to another issue which is the heart of this study: "What is the significance, or, more importantly, the role of justice in modern international law?"

Although the word "justice" is used in the UN Charter in a number of places, it is not defined. Commentary to the Charter suggests that justice is used in the Charter as a safeguard against the settlement of international disputes by sacrificing the rights of smaller, less powerful nations. The Munich appeasement was in the recent memories of many of the original signatories of the Charter.

The first paragraph of the Preamble to the Charter states that one of purposes of the organization is ". . . to establish conditions under which *justice* and respect for the obligations arising from treaties and other sources of international law can be maintained . . . (emphasis added)." ¹⁹⁵ As used here, the word "justice" was included ostensibly to protect the rights of smaller nations in the international dispute process. It is noted, however, that word "justice" as used in the Preamble is left undefined: "It must be admitted that the word

¹⁹⁵ The Preamble of the United Nations Charter reads as follows: "We The Peoples of the United Nations Determined to save succeeding generation from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,
And For These Ends to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,
Have Resolved To Combine Our Efforts To Accomplish These Aims. Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations." Goodrich & Hambro, *supra* note 134, at 87.

“justice” is a fairly vague concept which leaves considerable discretion to the organ which is called upon to apply it.”¹⁹⁶

The word “justice” appears again in Articles 1(1)¹⁹⁷ and 2(3)¹⁹⁸ of the Charter. Consistent with the interpretation of the word “justice” as used in the Preamble, it appears that it was inserted almost as an after thought designed to prevent appeasement of international disputes at the expense of smaller nations.¹⁹⁹

III. THE CONSIDERATION OF JUSTICE IN REGULATION OF INTER-STATE USE OF FORCE

As was discussed above²⁰⁰ Article 2(4) of the United Nations Charter is the cornerstone of modern international law restricting the use of armed force among nations. The ICJ has recognized the restriction of force contained in Article 2(4) as a preemptive norm of international law (*jus cogens*). Although the latter point may be subject to debate, inquiry will now be made as to desirability interpreting Article 2(4)’s prohibition as all-encompassing.

¹⁹⁶ *Id.* at 95.

¹⁹⁷ Article 1(1) states: “[The purposes of the United Nations are:] To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of *justice* and international law, adjustment of settlement of international disputes or situations which might lead to a breach of peace; (emphasis added).” *Id.* at 93.

¹⁹⁸ Article 2(3) states: “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and *justice*, are not endangered; (emphasis added)” *Id.* at 101.

¹⁹⁹ It is noted that the word “justice” as it appears in Articles 1(1) and 2(3) did not appear in the original Dumbarton Oaks proposals. These words were added on the proposal of several governments. For example, the delegation from Bolivia recommended the words “and justice” be inserted in article 2(3). Goodrich, 102. The Dumbarton Oaks proposals were the culmination of submission of proposals for the United Nations Charter signed on October 7, 1944 by representatives of the United States, the United Kingdom, the Soviet Union, and China. These proposals lay the framework for the charter. *Id.* at 6-10.

Many arguments have been made to limit the scope of Article 2(4) based on a variety of arguments.²⁰¹ What will be advanced here is the suggestion that the consideration of justice in international relations, applying the equalizing, judicial and reparative definitions of justice, allows (and demands) an expanded use of interstate force. Specifically, in the area of expanded national self-defense, to include anticipatory self-defense and the restricted use of reprisal. Further, it will be argued that these same notions of equalizing justice allow for humanitarian interventions, to protect both national and non-nationals abroad.

²⁰¹ Examples of attempts to limit the scope of 2(4) include:

1. States not complying with judgments rendered by the ICJ. But, Article 94(2) requires the aggrieved party to turn to the Security Council for recourse.
2. Recovery of territory illegally occupied by another state. (e.g. Falklands, Kuwait, Palestine).
3. Use of force for self-determination. The argument suggests that since a colonial regime was installed by force, the continued denial of self-determination amounts to a “permanent aggression.” see, DINSTIEN, *supra*, note 1 at 88 (citing R.E. Gorelick, *Wars of National Liberation: Jus ad Bellum*, 11 CWRJIL 71, 77 (1979)). This is the most recent argument for the resurrection of the just war concept. However it fails under the weight of 2(4)’s prohibition on the use of armed force, unless the conditions of self-defense or collective security are met. “In the words of Judge Schwebel (in his Dissenting Opinion in the Nicaragua case):

it is lawful for a foreign State . . . to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State . . . to intervene in that struggle with force.” see, *Id.* at 88 (citing, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 (Merits)).

4. Humanitarian intervention using force to overthrow a despotic government. “. . . the exponents of the punitive right of humanitarian intervention minimize the link of nationality (intra-state struggle not involving the “territorial integrity” or the “political independence” of another state) and uphold the protection of all individuals or groups of individuals . . .” see, *Id.* at 89 (parenthetical added) (citing, R.B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L.REV 325, 332 (1967-68)).

“Nothing in the Charter substantiates the right of one State to use force against another under the guise of securing the implementation of human rights. The International Court of Justice rejected the notion that the United States could employ force against Nicaragua in order to ensure respect for human rights in that country.” see, *Id.* at 90 (citing, T.M. Franck and N.S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM.J.INT’L L. 275, 299-302 (1973), and, Military and Paramilitary Activities (Nic. v. U.S.) 1986 (Merits)).

The humanitarian interventions in Iraq (to protect the Kurdish minority, UN resolution 688), the former Yugoslavia (UN res 781) and Somalia (UN res 794), were not unilateral actions, but collective actions approved through the Security council.

A. ANTICIPATORY SELF-DEFENSE AS A FORM OF SELF-HELP

Historically, self-help has been a primary tool used by nations to remedy wrongs perpetrated upon them. "The reliance on self-help, as a remedy available to States when their rights are violated, is and always has been one of the hallmarks of international law."²⁰²

Under customary international law, "self-help" has taken many different forms. From non-forcible measures, such as diplomatic and economic sanctions, to forcible measures such as armed reprisals, retorsion and self-defense.²⁰³

Self-help under international law may be displayed in a variety of ways. In the first place, an aggrieved State may resort to non-forcible measures, such as severing diplomatic relations with another State Additionally, legitimate self-help in the relations between states may take the shape of forcible measures, in which case these measures must meet the requirements of self-defence.²⁰⁴

Self-defense is a form of self-help in which one nation uses legally-sanctioned force against unlawful aggression: ". . . the proper approach is to view self-defence as a species subordinate to the genius of self-help. In other words, self-defence is a permissible form of 'armed self-help'."²⁰⁵

Self-defense in inter-State relations may be defined as a lawful use of force (principally, counter force), under conditions prescribed by international law, in response to a previous unlawful use, or threat, of force.²⁰⁶ "In legal phraseology, self-defence is confined to

²⁰² *Id.* at 175 (citing, HANS KELSEN, GENERAL THEORY OF LAW AND STATE 339 (1945)).

²⁰⁴ DINSTIEN, *supra*, note 1 at 175.

²⁰⁵ *Id.* at 175 (citing, Report of the International Law Commission, 32 Session, [1980] II (2) ILC Ybk 1, 54).

²⁰⁶ *Id.* at 175 (citing, Report of the International Law Commission, 32 Session, [1980] II (2) ILC Ybk 1, 55).

circumstances in which a State responds with lawful force to unlawful force (or, minimally, to the threat of unlawful force).²⁰⁷

Article 51 of the UN Charter encodes the right of nations to self-defense:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take any action as it deems necessary in order to maintain or restore international peace and security.²⁰⁸

If a nation is properly exercising self-defense, the nation against whom the force is used must be in violation of the corresponding duty to abstain from the illegal resort to force.

"There can be no self-defense against self-defense".²⁰⁹

Recognition of the right to self-defense is natural to any society which attempts to prohibit the use of armed force. "Any law, international or municipal, which prohibits recourse to force, is necessarily limited by the right of self-defence."²¹⁰ This is apparent in the wording of Article 51. It does not create the right of self defense, it merely recognizes the right as "inherent."²¹¹

²⁰⁷ *Id.* at 176.

²⁰⁸ Goodrich & Hambro, *supra* note 134, at 297.

²⁰⁹ The Ministries Case (U.S. v. Von Weizsaecker et al.) (Nuremberg, 1949).

²¹⁰ In re Hirota and Others (International Military Tribunal for the Far East, Tokyo, 1948).

²¹¹ Christopher Greenwood, *International Law and the United States' Air Operation Against Libya*, 89 W. VA L. REV. 933, 938 (1986). In their commentary to Article 51, Goodrich and Hambro state: "The Article safeguards the right of self-defense which is referred to as being "inherent". By so doing it follows a long line of precedents where in connection with international agreements of this kind the right of self-defense has been tacitly or explicitly reserved. In connection with the Kellogg-Briand Pact of 1928, which contained no explicit reservation of the right of self-defense, the American Secretary of State, Mr. Kellogg,

The issue of defining the permissive limits of self-defense remains. Generally, commentators recognize three requirements which must be fulfilled before the resorting to armed self-defense under Article 51: (1.) there must be a prior international wrong, intentionally inflicted, of such magnitude to justify an armed response; (2) the use of force must be necessary to protect against the wrong committed; and (3) the measure of force used must be proportional to the wrong or threatened wrong.²¹² These requirements fall within the realm of judicial and reparative justice, seeking reparation for a harm wrongfully inflicted.

A restrictive interpretation of Article 51 suggests that the right to self-defense can only be invoked in response to an armed attack.²¹³ ". . . only a special form of aggression

observed that the right was inherent and that there was no necessity of stating it expressly." Goodrich & Hambro, *supra* note 134, at 299 (citing, The General Pact for Renunciation of War, Text of the Pact as Signed, Notes and Other Papers, Washington, 1928).

²¹² Greenwood, *supra* note 211, at 938-939. Self-defense consists of two distinct phases. First, the aggrieved state acts immediately to oppose an aggressor. The State has an unfettered right to act as it sees best. In the second phase, a competent international forum reviews the entire action to determine the legality of the force employed. "If the Council is paralyzed and fails to take any measure necessary to maintain international peace and security, the legal position is . . . obvious: a Member State exercising the right of self-defence may persist in the use of force." DINSTIEN, *supra*, note 1 at 208.

This two-phased self-defense process was approved by the international tribunal in Nuremberg after World War II. "The Judgment of the International Tribunal at Nuremberg fully endorsed the two stages concept: It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Kellogg-Briand Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." *Id.* at 204-205.

²¹³ Two weaknesses of Article 51 were noted shortly after its implementation. First, it has noted that the Charter was executed before the advent of nuclear weapons. Therefore, Article 51 was not designed to provide for appropriate defense against weapons of mass destruction. Second, and more importantly, Article 51 assumes that the Security Council will take the proper "measures necessary to maintain international peace and security." Goodrich & Hambro, *supra* note 134, at 298.

amounting to an armed attack justifies self-defense under Article 51.²¹⁴ A nation under the *threat of force* may only prepare for attack and submit the matter to the Security Council (emphasis added).²¹⁵ This restrictive interpretation does not allow for the use of self-defense in response to the threat of force, nor does it permit anticipatory self-defense. "Proponents of a narrow interpretation of article 51 point to the fact that the text refers only to the right of self-defence in the event of an *actual*, rather than an *anticipated*, attack."²¹⁶

There is, however, another school of thought that maintains that Article 51 outlines only one form of self-defense, and that it does not negate other forms legitimate action allowed by customary international law. This broader view of self-defense argues: ". . . that the customary law right of self-defence was not confined to cases in which an armed attack had occurred and that article 51 was not intended to curtail the customary right."²¹⁷ Three arguments have been advanced for the continued existence of the right to anticipatory self-defense: (1) anticipatory self-defense is permitted under customary international law²¹⁸; (2) modern state practice indicates that the right to anticipatory self-defense still exists; and (3) there are strong policy arguments for the continued application of anticipatory self-

²¹⁴ DINSTIEN, *supra*, note 1 at 183.

²¹⁵ It is worthy of note that this view of Article 51 condemns the United States imposed quarantine on Cuba in 1962 in response to the placement of Soviet missiles on the island. In the absence of armed attack, no recourse to self-defense could be made. *Id.* at 186.

²¹⁶ Greenwood, *supra* note 211, at 942.

²¹⁷ *Id.* at 940 (citing, DEREK BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 11, 187-93 (1958)). Judge Schwebel in his dissenting opinion in the Nicaragua case rejected the notion that Article 51 encompassed only self-defense in response to an armed attack.

²¹⁸ Commentary to Article 51 states: "The provisions of Article 51 do not necessarily exclude the right of self-defense in situations not covered by this Article. If the right of self-defense is inherent as had been claimed in the past, then each Member retains the right subject only to such limitations as are contained in the Charter." Goodrich & Hambro, *supra* note 134, at 301.

defense.²¹⁹ A fourth argument may be added to this list: the demands of equalizing justice require reparation from a party culpably inflicting harm upon another.

First, customary international law allows for the use of armed force in response to an imminent attack or threat of attack. The limitations placed on the customary use of anticipatory self-defense was first set out by United States Secretary of State Daniel Webster in the famous *Caroline* case. In his written letter to the British government responding to the destruction of the American-flagged vessel, Caroline, by the British, Webster states that force can be used in response to a threatened attack only if the threat was "instant, overwhelming, leaving no choice of means and no moment for deliberation."²²⁰ The *Caroline* criteria allowing for the use of anticipatory self-defense have been refined over time and can be summarized as the need for necessity, immediacy, and proportionality.

The drafting history of Article 51 suggests the broad interpretation is not without merit:

Since article 51 was added to the Charter almost as an afterthought to reassure some states that the right of self-defence was not being removed, it is unlikely that there was any intention on the part of the founding members of the United Nations to restrict the scope of this customary law right. The fact that article 51 specifically provides that 'nothing in the present Charter shall impair the inherent right of self-defence . . .' reinforces this conclusion.²²¹

Moving to the second rationale for the expanded use of forcible self-defense, state practice since 1945 indicates substantial support for the use of anticipatory self-defense. "When Israel resorted to force in the 1967 Six Day War, it was condemned neither by the Security

²¹⁹ Greenwood, *supra* note 211, at 943.

²²⁰ *Id.* at 943 (citing, 2 J.B. MOORE, A DIGEST OF INTERNATIONAL LAW, section 217 (1906)).

²²¹ *Id.* at 942-43 (U.N. Charter, Article 51). The genesis of Article 51 has been described in this way: "This Article, although included in the Chapter dealing with enforcement action by the United Nations, was adopted at the United Nations Conference as a part of a plan for harmonizing the operation of regional arrangements and agencies with that of general provisions of the Charter. More specifically, it was the outcome of careful study of the best means of fitting the system of the American Republics in to the United Nations . . ." Goodrich & Hambro, *supra* note 134, at 297.

Council nor the General Assembly, despite the fact that it is difficult to analyse the Israeli action as lawful unless a right of anticipatory self-defense exists.²²² The Soviet Union relied on the right to anticipatory self-defense for its armed interventions in Czechoslovakia in 1968 and Afghanistan in 1979. The U.S. support its April 1986 bombing raid on Libya as anticipatory self-defense.²²³

Third, there are strong policy and common sense arguments supporting the legality of the right to anticipatory self-defense. This argument is based on the recognition that the U.N. is extremely limited in responding to the imminent threat of force by one nation against another:

Even if the Security Council functioned as an effective mechanism for the enforcement of collective security, it would be unrealistic to expect a state faced with an imminent armed attack to wait for that attack to be launched before resorting to force in self-defence. Given the fact that there is no real prospect of the Security Council acting to protect the victim of an attack, the restrictive view of self-defence becomes even less realistic.²²⁴

Most commentators of Article 51 agree that the Article was never intended as a full-proof prohibition against all self-defense except that in response to an armed attack.²²⁵ "The world

²²² Greenwood, *supra* note 211, at 943. A draft resolution which would have denounced Israel as the aggressor secured only four votes in the Security Council. See U.N. Doc. S/PV 1360 (1967). In the General Assembly a draft resolution which would have condemned Israel was defeated by 71 votes to 22 with 27 abstentions. *Id.* at 943 n.56.

²²³ A draft Security Counsel resolution condemning the U.S. raid failed: nine votes in favor to five against, with one abstention. *Id.* at 960.

²²⁴ *Id.* at 944.

²²⁵ This is evidence by the fact that "the architects of the Charter deliberately decided not to undertake a definition of aggression, leaving it to the Security Council to decide in each case whether a particular act constitutes a threat to the peace or a violation of the peace." GOODRICH & HAMBRO, *supra* note 134, at 300.

is not as cooperative as Article 51 suggests in its sequence of attack first, then defend.”²²⁶ The capability of modern weaponry must be taken into account when applying self-defense rules. The rule of anticipatory self-defense, as restricted by the traditional Caroline factors of necessity, proportionality, and immediacy, is more appropriate to the present international environment.²²⁷

Fourth, the notion of equalizing justice requires reparation when harm is culpably inflicted and the guilty party makes no offer of recompense. An unjustly inflicted harm left unrequited arguably does more harm to the society of nations than immediate justifiable action. This argument is emanates from the fact that members of any society (whether of individuals or nations) will not submit to a sovereign that is powerless to protect individual rights. To be sure, this is one of the primary reasons that individuals come together in societies, to ensure the protection and enforcement of their rights.

This does not mean to say that the expanded notion of self-defense will dismantle all progress made by the United Nations and return to the nineteenth century model of power primacy. The use of self-defense will still be limited by the Charter, however the interpretation of the Charter will be made in light of the realities that exist within the international society. Nations will not be able to use armed force under the guise of self-defense to bludgeon another into bowing to its political will. By the same token, nations

²²⁶ Rein Mullerson & Daniel J. Scheffer, *Legal Regulation of the Use of Force*, in Damrosch, BEYOND CONFRONTATION, *supra* note 147, at 93, 110.

²²⁷ It should be remembered that the United Nations Charter was signed against the backdrop of two brutal world wars. “It was the unity born of the experience of war which in the last analysis produced this common effort in the cause of peace.” GOODRICH & HAMBRO, *supra* note 134, at 3. The Charter was drafted and signed with an eye toward maintaining international peace and security. There is no evidence which suggests that the drafters of the Charter anticipated many issues which face the international society today. These include: often unbridled terrorism, the threat of nuclear weapons and other weapons of mass destruction and humanitarian atrocities.

should not have to endure repeated attacks on their nationals abroad, or other breaches of their national sovereignty while the world governmental organization remains powerless to take any action beyond mere verbal condemnation.

Under Article 51, the Security Council is the sole arbiter of the lawfulness of the use of force in self-defense. The ICJ, however, should also rule on the legality of the use of force in appropriate cases. Article 36 of the Statute of the ICJ gives the Court jurisdiction to determine "the nature or extent of the reparation to be made for the breach of an international obligation."²²⁸ Professor Dinstien has noted, ". . . as the 1986 Judgment in the *Nicaragua* case elucidated, the legitimacy of recourse to self-defence may also be explored-in appropriate circumstances-by the International Court of Justice."²²⁹ This gives nations the benefit of a neutral forum for presenting their case if the oligarchic Security Council system is paralyzed to take action.

B. REPRISAL

"Reprisal" is a legal term of art that has been historically included under the more general heading of "Retaliation". Retaliation, as used by international theorists, is a blanket term suggesting two more specific types of redress among nations.²³⁰ The two types of redress commonly included under retaliation are retorsion and reprisal.

Retorsion, unlike reprisal, has nothing to do with international delinquencies. Retorsion is the use of force to achieve political ends, not to make reparation for harm wrongfully inflicted. In comparison, the object of reprisal is to compel satisfactory reparation from a

²²⁸ Article 36(2)(d), Statute of the International Court of Justice. *Id.* at 619.

²²⁹ DINSTIEN, *supra*, note 1 at 205.

²³⁰ Authorities disagree on the exact meaning of these terms. The definitions set out here are generally accepted among commentators on international state practice. see, EVELYN SPEYER COLBERT, RETALIATION IN INTERNATIONAL LAW 3 (1948).

nation culpable of breaching international law. Reprisal is described as the ". . . the term applied to such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency."²³¹

²³¹ *Id.* at 2 (citing 2 OPPENHEIM, INTERNATIONAL LAW 36-37 (2d ed. 1912)).

Reprisals can further be categorized as public and private. "Public reprisals may . . . be defined as coercive measures taken by one state against another, without belligerent intent, in order to secure redress for, or to prevent recurrence of, acts or omissions which under international law constitute international delinquency." *Id.* at 2 (citing, A.E. HINDMARSH, FORCE IN PEACE 58 (1933)).

Private reprisals were almost invariably based on the failure to pay debt, robbery on land or sea, or injury to the person. Regarding private reprisals, two elements were involved in the denial of justice. (Procedures to be followed in executing a private reprisal were often set out in international treaties or local regulations. see, *Id.* at 27-42. Notwithstanding these agreements for the execution of private reprisals, the practice was often abused and used as an excuse for piracy.) "These were: the commission of a wrong by the citizen or agent of one state against the citizen or agent of another; the denial of redress to the individual wronged despite the interposition of his own ruler, frequently involved also was an intermediate stage--the inability of the wronged individual to obtain redress from the criminal's state by his own efforts." *Id.* at 17.

Through ancient Roman times, through the medieval period, and up to the 18th century, the right to issue a letter of reprisal (letter of marque) rested on the pre-existence of a denial of justice. This standard held true for both private and public reprisals. Early public reprisals were often carried out in the same manner as private reprisals, however the basis for public reprisals was different. "Authorization of public or 'universal' reprisals generally opened with a recital of grievances against a nation as a whole, for which grievances it had been impossible to obtain satisfaction." For example, in 1715, English Admiral Sir John Norris was ordered to seizing Swedish shipping in response to similar acts committed by the King of Sweden against Britain. *Id.* at 51-52. By the 18th century the use of private reprisals greatly decreased as international trade became less hazardous, foreign commerce was given legal status in domestic courts and the power of the State usurped the power of the individual to press international claims.

The line between public and private reprisals was often blurred. The main distinguishing feature of public reprisals was that it was used as a sanction against an offending nation, not simply as redress of a wrong.

"The chief distinguishing feature of public reprisals, however, is not so much their use of state power--for this was characteristic of the earliest form of private reprisals--as it is they authorized unlimited seizures as a sort of punishment of the offending state. In other words, compensation ceased to be the object of reprisals when they became public; retaliatory seizures became instead a sanction, a weapon to enforce a change in the opponent's policy." *Id.* at 55.

By the nineteenth century, public reprisals were used less as a method to secure pecuniary satisfaction and more as means of coercion with the end of restoring justice. "By the middle of the nineteenth century two methods of enforcing public reprisals prevailed, pacific

The international society under the UN Charter has not supported the right of states to use reprisals as a lawful means of self-help. The United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States provides that “[s]tates have a duty to refrain from acts of reprisal involving the use of force.”²³² The General Assembly’s pronouncement against the use of reprisals is buttressed by practice by Security Council action in specific cases.²³³

The UN Charter seeks to eliminate, rather than regulate, the unilateral use of force by nations. The restrictivist view suggests that the only unilateral use of force permitted under the Charter is self-defense in response to an actual and on-going armed attack. This would

blockade and acts of force on the territory of the offending state.” *Id.* at 61. The denial of justice included: unjust judgments or interference with the processes of justice, failure to observe international law regarding foreign nationals (for example, in 1923, Italy bombarded and occupied the island of Corfu off the coast of Greece in reprisal for the alleged killing of an Italian general officer by Greek extremists. The case was brought before the League of Nation Conference of Ambassadors regarding the issue of Greece’ failure to issue the proper apology and restitution as demanded by Mussolini. Italy prevailed. *Id.* at 82-83.), disregard of contractual, treaty or financial obligations, and insults to national honor. (An example insult to national honor is the American occupation of Vera Cruz in 1914 “. . . as retaliation for Mexico’s failure to apologize in the required fashion for the arrest of certain American sailors engaged in the performance of their duties.” *Id.* at 68. Apparently, eight American sailors loading kerosene on a U.S.-flagged vessel, were arrested by a Squad of Mexican soldiers and marched through the streets of Tampico. Upon notification by American authorities, the Mexican officer responsible for the arrest was himself arrested, “. . . but the Mexican Government refused to comply with the demand that they hoist the American flag in a prominent position and salute it with twenty-one guns. In retaliation United States forces occupied the city of Vera Cruz, bombarding the southern section.” *Id.* at 77 (citing, FOREIGN RELATIONS OF THE UNITED STATES 446-479 (1914)).

²³² Greenwood, *supra* note 211, at 950.

²³³ For example, the in the 1964 Fort Haribb Incident, Britain bombarded a Yemeni fort it claimed was being used as a base for attacks into the South Arabian Federation (a British protectorate). The British argued that in light of numerous past attacks, the attack on the Fort was justified as anticipatory self-defense against future attacks. “The Security Council, however, rejected this wider view of anticipatory self-defence against attacks which were not imminent and condemned the British action as an illegal reprisal.” *Id.* at 945. The resolution was adopted by 9 votes to 0 with 2 abstentions.

negate the permissibility of the use of force as a sanction for a anticipatory, continuing or past wrong.²³⁴

Under the restrictivist view, nations lose the right to determine the illegality of acts committed by another and to decide on the method of redress for the illegal acts. The Security Council is the sole arbiter of such situations. This procedure for addressing international delicts does not comport with customary international law.

Customary international law before the Charter permitted reprisal to sanction prior wrongs. "The traditional requirement for a lawful reprisal were stated in the award made by the tribunal in the *Naulilaa* arbitration²³⁵ as follows: (1) There must have been a prior international wrong committed by the target state against the state taking reprisals; (2) the injured state must have been unable to secure reparation by peaceful means,²³⁶ and (3) the reprisal undertaken had to be reasonably proportionate to the initial wrong."²³⁷ To the above

²³⁴ The restrictivist view is summed up well here: "Self-defense against armed attack 'until the Security Council has taken the measures necessary to maintain international peace and security . . .' is the only unilateral use of force specifically authorized by the Charter. Logically, therefore, unless it has been directed to take such measures by the Security Council acting under Chapter VII, the individual state loses the right to embark on acts of force short of war on the grounds that a prior illegality has committed by another state (except in self defense as defined)." COLBERT, *supra* note 230, at 202.

²³⁵ The *Naulilaa* Incident, 2 R. Int'l Arb. Awards 1011 (1928). The *Naulilaa* case involved a German reprisal against Portuguese settlements in Africa (Southern Angola) for the killing of a German official. The German reprisal involved an armed intervention into Portuguese colonial territory, forcing the Portuguese defenders to withdraw. In condemning the German reprisal as disproportionate to the harm inflicted, the court described reprisals in this way: "They are limited by considerations of humanity and the rules of good faith, applicable in the relations between States. They are illegal unless they are based upon a previous act contrary to international law. They seek to impose on the offending State reparation for the offence, the return to legality and the avoidance of new offences." L.C. GREEN, INTERNATIONAL LAW THROUGH THE CASES 686 (1970).

²³⁶ This requirement appears in the *Naulilaa* award but the arbitrators in that case cited no previous authority to support this requirement and it is doubted by some international law theorists. Greenwood, *supra* note 211, at 949 n.90.

²³⁷ *Id.* at 949.

Naulilaa criteria, Professor Greenwood adds a fourth: ". . . namely that the object of the reprisal should not be simply the punishment of the offending state but an attempt to put an end to a continuing wrong, to secure reparation, or perhaps, to deter repetition of the wrongful act by the offending state."²³⁸

On paper, the difference between self-defense and reprisal is cognizable. Self-defense is aimed as repulsing an on-going armed attack and protecting the territorial integrity and political independence of a nation. In contrast, reprisals seek to impose reparation for harm already done, or to compel the offending state to comply with the law in the future. The crux of the difference between self-defense and reprisal is that the former is considered to have a strictly protective or preventative purpose, while the latter has a sanctioning character.²³⁹

Drawing a distinction between these two forms of self-help denies the practical realities of the modern international society. Chief among these is the issue of what response may a nation take against a series of small armed attacks that are on-going (such as a guerrilla insurgency or terrorist attacks). The restrictivist view allows for no unilateral action by a nation so aggrieved. The only proper response is to submit the matter the Security Council for action.

A better view is to subsume armed reprisal under the broader category of lawful self-defense when the proper factors are considered and applied. These factors, as already noted, are: (1) the infliction an international wrong involving the use of armed force; (2) reparation

²³⁸ *Id.* at 949 (citing, Case Concerning the Air Services Agreement of 27 March 1946 between the United States and France, 54 I.L.R. 303 (1978)). This case concerned counter-measures or reprisals not involving the use of force, it is unlikely that any right of armed reprisal which might still exist would be more extensive than the right to take reprisals not involving the use of force.

²³⁹ Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM.J.INT'L L. 586, 589 (1972).

of the wrong is not possible through peaceful means; (3) the armed reprisal is proportionate to the aggregate harm inflicted, and; (4) the reprisal is primarily taken for reparation (to include future compliance with international law), not solely for punishment.

This view has been argued by Professor Dinstien:

Armed reprisals are measures of counter-force, short of war, undertaken by one State against another in response to an earlier violation of international law. Like all other instances of unilateral use of force by States, armed reprisals are prohibited unless they qualify as an exercise of self-defence under Article 51. Only defensive armed reprisals are allowed. They must come in response to an armed attack, as opposed to other violations of international law, in circumstances satisfying all the requirements of legitimate self-defence.²⁴⁰

Equalizing justice elements of reparation and requital are fulfilled with the proper use of armed reprisal. If the four parameters for the invocation of reprisal are appropriately applied, the use this method of self-help will be strictly circumscribed. Doing away with the UN fiction of prohibiting reprisals will not give nations carte blanche to use armed force whenever they deem it to be politically expedient. This is not the goal of lawful armed reprisals. "The goal of defensive armed reprisals is to 'induce a delinquent state to abide by the law in the future', and hence they have a deterrent function."²⁴¹

Adding reprisals to the law/justice continuum appears as follows:

Figure 4: LAW/JUSTICE CONTINUUM ADDING EXPANDED SELF-DEFENSE

²⁴⁰ DINSTIEN, *supra*, note 1 at 216.

²⁴¹ *Id.* at 222 (citing, Tucker, *supra* note 239, at 591).

Societies-Law of Power	Hybrid-Law of Reciprocity	Community-Law of Co-Ordination Shared ethics/values
Unequal justice/Victor's Justice/No Justice	Equalizing justice <ul style="list-style-type: none"> -juridical -reparative -communicative -corrective (requital) -Just War-proportionality, necessity, charity (civility), volitional justice -Anticipatory Self-Defense-Caroline Factors -Reprisal-Culpability -No Reparation Thru Peaceful Means -Proportional Response -Primary End of Reparation, not Punishment 	Distributive justice -subordination to community. Co-ordination btw subjective heinos

C. HUMANITARIAN INTERVENTION²⁴²

²⁴² Humanitarian Intervention is a concept that is often defined very broadly, to include interventions against so called “illegitimate or lawless” regimes, or interventions to uphold and install democratic governments. The U.S. military has placed this type of intervention under the broad category of “Stability Operation.” “Stability Operation” is a term of art finding its origins in U.S. Army lexicon. As used in the 1965 Dominican Republic intervention, “stability Operation” was defined by General Harold K. Johnson, chief of staff of the U.S. Army, as follows: “Operations designed to help a country attain its legitimate aspirations in an atmosphere of tranquillity.” LAWRENCE A. YATES, COMBAT STUDIES INSTITUTE, U.S. ARMY COMMAND AND STAFF COLLEGE, POWER PACK: U.S. INTERVENTION IN THE DOMINICAN REPUBLIC, 1965-1966, 73 (Leavenworth Papers, no. 15)(1988).

Historically, however, claims that democracy justifies the use of military force have been unfounded. As Professor Henkin points out, “[t]he Charter would be meaningless if it were construed or rewritten to permit any state to use force to impose its own version of democracy.” Louis Henkin, *The Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 61 (1989). These same sentiments are echoed by the ICJ in *Nicaragua*.

Notwithstanding the international norm of non-intervention, support for pro-democracy intervention has gained support in recent years. This trend is, in part, fueled by the proliferation of covenants and treaties protecting human rights and self determination. This is the same trend which is driving the contemporary theorists advocating humanitarian interventions. (see *UNIVERSAL DECLARATION OF HUMAN RIGHTS IN BASIC DOCUMENTS IN INTERNATIONAL LAW* (3d Ed., Ian Brownlie ed.) 250 (1983).)

The roots of pro-democracy intervention go back to the Wilsonian era. President Wilson’s interventions in Haiti and the Dominican Republic in 1915 were justified on democratic and altruistic grounds. The basis of Wilsonian foreign policy was to advance humanity and “liberate peoples oppressed by despotic rule...” Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT’L L.J. 341, 347 (1995). Although it may be true that moralistic factors were intrinsic to President Wilson’s world view, it is difficult to overlook the geo-political advantage the United States achieved by intervening in Latin America. America moved from a regional power to world power under President Wilson.

The Wilsonian legacy was carried forward four generations under the “Reagan Doctrine.” Set forth in the early 1980’s, this doctrine “enunciated a pro-democracy orientation toward intervention, although its implementation in Central America and elsewhere was exclusively preoccupied with helping anti-left political forces regardless of their credentials as democrats, and refused to challenge rightist modes of oppression, however severe.” *Id.* at 351. This is same policy the Johnson Administration advocated during the 1965 Dominican intervention. To be sure, the Reagan Doctrine was similar in many aspects to the foreign policies of every American President during the Cold War period.

The key difference between the Wilsonian doctrine of pro-democracy intervention and the model presented today, is the means of intervention, and underlying basis for the intervention. Although the Wilsonian Doctrine contained concepts of morality, its primary purpose was to gain an international advantage. Whether that advantage be protecting the isthmian canal in Latin America, or preventing German intervention in the Western hemisphere. The means of carrying out the Wilsonian doctrine was almost exclusively unilateral U.S. intervention.

International law has recognized humanitarian interventions for centuries.²⁴³ Grotius, writing in 1625, declared that if a tyrant "should inflict upon his subjects such treatment as no one is warranted in inflicting, the exercise of the right vested in human society is not precluded."²⁴⁴

To begin a discussion of humanitarian intervention, a working definition must be established. There is no universally accepted definition of the concept. A widely used definition of humanitarian intervention is as follows: "[R]eliance upon force for the justifiable purpose of protecting a nation's own citizens or the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."²⁴⁵

The model of pro-democracy intervention advocated today requires UN-sanctioned, collective action. This model was applied in the Haiti intervention. The basis for the intervention could be for the, (1) Irregular interruption of democratic governance, or (2) Collapse of civil order, entailing substantial loss of life and precluding the possibility of identifying any authority capable of granting or withholding consent to international involvement. see, Lori Fisler Damrosch, *Nationalism and Internationalism: The Wilsonian Legacy*, 26 N.Y.U.J.INT'L L. & POL. 493, 495 (1994).

²⁴³ "Although there were acts of armed intervention in the 19th and early 20th centuries that responded to humanitarian concerns, most of these interventions advanced the political objectives of the intervening state(s)." Damrosch, BEYOND CONFRONTATION, *supra* note 147, at 118. For example, in the 19th century "... there were several cases of in which the powers of Europe authorized military or naval action to protect various minorities." Louis B. Sohn, *International Law and Basic Human Rights*, in 62 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 587, 591 (1980) In 1831, the French army and a combined Franco-British naval squadron forced the withdrawal of the Dutch army from Antwerp, stopping the siege of the city and allowing for the independence of the Belgian minority from the Dutch empire. Dupuy & Dupuy, *supra* note 26, at 771. In 1860, France intervened militarily in Syria to defend against the slaughter of the Christian population at the hands of the Ottoman Empire. Barry M. Benjamin, *Unilateral Humanitarian Intervention, Legalizing the Use of Force to Prevent Human Rights Atrocities*, 16 FORDHAM INT'L LAW JOURNAL 120, 128 (1992).

²⁴⁴ Nikolai Krylov, *Humanitarian Intervention: Pros and Cons*, 17 LOY. L.A. INT'L & COMP. L.J. 365, 368 (1995).

²⁴⁵ *Id.* at 367. "[T]here is a substantial body of opinion and practice in support of the view that...when a State renders itself guilty of cruelties against and persecution of its nationals in

Humanitarian intervention has customarily been justified on the ground that it is a permissible interference of the sovereignty of the invaded state.²⁴⁶ It may be argued that sovereignty is not absolute: when a state reaches the threshold of shocking the conscience of mankind, intervention is legal.²⁴⁷

Efforts to limit the use of force by nations and minimize human suffering was a primary consideration after World War II. Concern for the degradation of human rights that occurred during World War II were evident at the United Nations Convention in San Francisco and were accompanied by efforts to develop provisions to combat inhumane acts by nations. It has been noted that:

[T]here existed in San Francisco a feeling that it was possible to go much further in the protection of human rights in the new charter than we went in the Covenant of the League of Nations. In consequence, provisions requiring the United Nations to promote the protection and the observance of human rights and fundamental freedoms are scattered throughout the charter . . .²⁴⁸

So compelling was the need to protect human rights that the U.N. General Assembly passed resolution 217A(III) on December 10, 1948 enumerating the basic and universal

such a way to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible." 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 312 (1955).

²⁴⁶ Although international law commentators disagree, some would argue that forcible humanitarian intervention is rooted in customary international law. In its earliest form, humanitarian intervention usually consisted of state-sponsored or state-approved private self-help to protect its citizens or property abroad. "From the very beginning this was a right of a nation to protect its citizens against another state, but exercised for a long time through private self help of the individual, who was, however, properly authorized to do it by the state." Sohn, *supra* note 243, at 588.

Thus, through the 18th century, privateers with the full sanction of their sovereign enforced breaches of individual and property rights through the practice of private reprisals. This practice acquired a high degree of uniformity in international law.

²⁴⁷ Richard B. Lillich, *Forcible Self-Help Under International Law*, 22 Naval War College Review 56, 61 (1970).

²⁴⁸ Sohn, *supra* note 243, at 592.

human rights and obligations of all peoples and nations. This resolution has become known as the Universal Declaration of Human Rights which the United Nations has asserted is legally binding on all nations.²⁴⁹

Although the Untied Nations Charter and numerous other conventions address the issue of human rights and fundamental freedoms at length,²⁵⁰ no formal mechanism exists for the enforcement of these rights.²⁵¹ Further, Article 2(4) of the Charter specifically prohibits the threat or use of force by nations.²⁵² This is the great paradox, and weakness, of the U.N. mandate. As one author aptly noted, “[t]his is the conundrum that has plagued the nations of the world ever since [the establishment of the United Nations]: the riddle of an organization with authority and no power; the paradox of a world where states have rights

²⁴⁹ The 1968 U.N. Conference on Human Rights in Teheran declared that the Universal Declaration was meant to be binding from its inception. Although the tenets of the Universal Declaration would appear to be plain to the Western observer (e.g. Art. 7 states that all are equal before the law and are entitled without any discrimination to equal protection of the law) many authors have pointed out that the Declaration is flawed in that it is predicated on the assumption that Western values are paramount and should be extended to the non-Western world. See generally, POLLIS & SCHWAB, HUMAN RIGHTS: A WESTERN CONSTRUCT WITH LIMITED APPLICABILITY (1979). An Illustrative example of the contrast between Eastern and Western cultural values is the concern in the U.S. over the recent seizure of Afghanistan's capital of Kabul by the extreme Islamic fundamentalist sect, Taliban. The Taliban have ordered the subjugation of most women in accordance with Islamic law.

²⁵⁰ The Charter refers generally to fundamental human rights in articles 1(3), 55(c), 62(2), 68, and 76(c). See Dep't of Army Pamphlet 27-161-1, 1 International Law: The Law of Peace, 3-13-3-14. See also, The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278 and the 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, U.N.G.A. Res. 39/46. See generally, BASIC DOCUMENTS IN INTERNATIONAL LAW 250-346 (Ian Brownlie ed., Claredon Press 1983)[hereinafter Basic Documents].

²⁵¹ The response of the international community to the Iranian seizure of fifty-two people in the U.S. Embassy in Tehran is illustrative of the lack of an effective U.N. mechanism to enforce human rights violations. In response to the hostage situation, the U.N. issued two resolutions (U.N. res. 457 and separate Security Council resolution) condemning the Iranian acts and the International Court of Justice (ICJ) issued an opinion stating the same. The Iranian authorities ignored all the demands and refused to cooperate with the ICJ.

but have ostensibly forsaken their remedies to an institution that, by and large, can insure no redress for wrongs . . .²⁵³

Three key issues are raised in light of the Charter's limitation on the use of force in conjunction with the Charter's mandate to protect and foster human rights: (1) What is the present status of the permissibility of humanitarian intervention as it existed under customary international law; (2) Does the Charter's prohibition on the use of force mean a state must refrain from any use of force whatsoever, even when another state is violating the humanitarian provisions of the charter and international law²⁵⁴; and (3) To what extent do sovereignty rules protect a nation guilty of human rights violations from outside intervention.

1. HUMANITARIAN INTERVENTION IN CASES INVOLVING NATIONAL SELF-DEFENSE

The self-defense measures of Article 51²⁵⁵ of the U.N. Charter has been applied to allow for the protection of nationals abroad from human rights violations. Examples of incidents where Article 51 was invoked include the 1970 intervention of India in East Pakistan (now Bangladesh) after the slaughter of approximately 10,000 Bengalis at the hands of the Pakistani army,²⁵⁶ the 1976 Israeli Entebbe raid, the failed attempt of the U.S. to rescue American hostages in Iran in 1979 and the 1986 U.S. armed reprisal against Libya.²⁵⁷

²⁵³ James J. McHugh, *Forcible Self-Help in International Law*, in 62 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES: READINGS FROM THE NAVAL WAR COLLEGE REVIEW 1947-1977 139, 140 (1985)[hereinafter McHugh].

²⁵⁴ Lillich, *supra* note 247, at 59.

²⁵⁶ Benjamin, *supra* note 243, at 131-134.

²⁵⁷ The Israeli rescue action in Entebbe, Uganda is an extreme example where Israeli lives were in danger and the Ugandan government had done nothing to protect or rescue them. See Leslie C. Green, *Rescue at Entebbe-Legal Aspects*, 6 Israel Y.B. on Human Rights 312 (1976). Commentators disagree over the proper uses of form in an U.N. art 51 self -defense action. See generally, Oscar Schatcher, *The Right of States to Use Armed Force* 82 Mich. L Rev 1620 (1984).

Although the use of force to protect nationals abroad has been generally accepted in international law when Article 51 of the U.N. Charter is strictly applied, nations utilizing such force can expect to have their actions closely scrutinized by the international community. For example, the British Navy entered the territorial waters of Albania to sweep for mines that had caused significant damage to British warships. Albania objected on the ground that such a practice violated Albania sovereignty, even if Britain was only attempting to protect its own vessels. The incident was later brought before the ICJ for resolution. In its 1949 Corfu Channel decision, the ICJ expressed reservation regarding the exercise of force by nations to protect national human interests abroad. The Court observed that the right to use force "in the cause of justice" would be "reserved for the most powerful states and might easily lead to perverting the administration of justice itself . . . [A] policy of force such as [this] has in the past given rise to most serious abuses and . . . cannot, whatever the effects in international organization, find a place in international law."²⁵⁸

Thus, the unilateral use of force to protect national human rights abroad is looked upon with great skepticism by United Nations organs. There is great concern that more powerful nations will abuse their inherent right of self-defense to fulfill ulterior motives. The preference under current international law is for collective measures, including those sanctioned by the United Nations and regional organizations, such as the North Atlantic Treaty Organization (NATO). Collective actions are more likely to succeed and their application is less likely to be questioned.²⁵⁹

²⁵⁸ Corfu Channel Case (U.K. v. Albania) (1949) I.C.J. Rep. 4 at 35.

²⁵⁹ Krylov, *supra* note 244, at 396-7.

2. HUMANITARIAN INTERVENTION IN CASES NOT INVOLVING NATIONAL SELF-DEFENSE

As already noted, the establishment of the U.N. brought a substantial body of human rights conventions, subjecting the international community to U.N. scrutiny and imposing numerous obligations for enforcement of human rights. The issue that persists is how does the international community enforce human rights mandates regarding non-nationals.

Chapter VII of the U.N. Charter allows for enforcement actions authorized by the Security Council.²⁶⁰ There are three prerequisites which must exist before a Chapter VII action can be authorized: (1) The Security Council must determine that a threat to peace, breach of peace or act of aggression exists in accordance with Article 39 of the Charter; (2) The nations concerned did not comply with provisional measures set forth by the Security Council (e.g. cease fire or withdrawal of forces); and, (3) In accordance with Article 42 of

²⁶⁰ Of course, the success of Chapter VII operations is completely dependent on support from individual nations. Factors historically considered by individual nations in deciding whether to resort to force in enforcing international law are: (1) Domestic support for the action, which is the political reality; (2) Anticipated forceful reaction of other powers, which is the diplomatic reality; and (3) The likelihood of the military operations success, which is the military reality. *Id.* at 370. (Military reality was specifically noted in former UN Secretary General Boutros Boutros Ghali's Supplement to an Agenda for Peace. He Secretary General Boutros Ghali stated: "In reality, nothing is more dangerous for a peace-keeping operation than to ask it to use force when its existing composition, armament, logistic support and deployment deny it the capacity to do so. Boutros Boutros Ghali, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, (3 January 1995), <<http://www.un.org/Docs/SG/agsupp.html>>. In practice, nations utilize force to protect national and international interests through application of the political, diplomatic and military realities listed above.

For example, the United States has set out the following factors to be considered when deciding to commit military forces to U.N. operations: (1) Is the commitment made with the clear intention of winning (a military reality); (2) Are there clearly defined political and military objectives (both a military and political reality); (3) Are the forces committed sufficient to meet the objectives (a military reality); (4) Is there support from the American public (a political reality); and (5) Is the commitment of U.S. forces a last resort (a diplomatic reality). Colonel Terry, U.S. Marine Corps, *The Evolving U.S. Policy For Peace Operations*, 19 S. ILL. U. L. J. (1994) 119 at 122.

the Charter, the Council determines that measures not involving the use of force would be inadequate or have proved to be inadequate.²⁶¹

The U.N. operation in Somalia in 1992 is the first time the Security Council authorized a Chapter VII operation to deliver humanitarian aid.²⁶² Security Council Resolution 794 of December 3, 1992 authorized "the Secretary General and Member States cooperating to ...use all necessary means to establish as soon as possible a secure environment for the humanitarian relief operations in Somalia." Therefore, "[t]he catalyst for the explicit action under Chapter VII was an Article 39 determination that the humanitarian situation in Somalia and the continuing civil war constituted a threat to international peace and security."²⁶³

Although Chapter VII authorization gives credibility and legitimacy to any forcible humanitarian intervention, such authorization is not required under customary international law. Some commentators argue that unilateral humanitarian intervention (i.e. no Chapter VII authorization) to protect non-nationals from imminent death or injury is permissible under international law. Although gaining increasing support, this view toward unilateral humanitarian intervention is in the minority.²⁶⁴

²⁶¹ Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate For the Use of Force In Maintaining International Peace and Security*, 19 MD J. INT'L AND TRADE 1 (1995)(Printed from WESTLAW unpaginated)[hereinafter Fink (unpaginated)]. It is interesting to note that the liberation of Kuwait in 1991 is the first time since the establishment of the Charter that all five permanent members of the Security Council authorized the collective use of force.

²⁶² The United Nations Operation in Somalia (UNOSOM I & II) were conducted with military personnel of 36 nations at a cost of over \$1.55 billion. At the height of the operation over 28,000 military personnel were committed. United Nations Pamphlet, United Nations Peace-Keeping 34-35 and 53 (1993).

²⁶³ Fink (unpaginated), *supra* note 261.

²⁶⁴ For commentary supporting the minority view see Malvina Halberstram, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT'L AND COMP. L. 1 (1995). For the view of the

3. THE ISSUE OF STATE SOVEREIGNTY

Humanitarian intervention justified on the ground that it is a permissible interference with another nation's sovereignty to defend its nationals abroad, or to prevent the violation of all peoples basic human rights.

State sovereignty is specifically addressed in Article 2(7) of the U.N. Charter which states,

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.²⁶⁵

Modern international law dictates that Article 2(7)²⁶⁶ must be read in context of the large body of human rights law that has developed since the founding of the United Nations. This developing body of international human rights law suggests an erosion of the principle of non-intervention set forth by Article 2(7) of the Charter.²⁶⁷

majority of nations see Jean-Pierre L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197 (Richard B. Lillich ed., University Press of Va. 1973).

²⁶⁵ GOODRICH & HAMBRO, *supra* note 134, at 110.

²⁶⁶ Article 2(7) of the U.N. Charter states as follows: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. *Id.* at 110.

²⁶⁷ Fink (unpaginated, *supra* note 261). The following statement from former United Nations Secretaries General de Cuellar and Boutros-Ghali are indicative of the trend to diminish the absoluteness of state of sovereignty. "The tension between the principle of nonintervention and humanitarian concerns was articulated by then UN Security -General Perez de Cuellar at the University of Bordeaux on April 24, 1991. He reflected upon the turmoil among theorists and political leaders as the world community copes with the precarious balance between the sovereignty of nations and the collective human rights of their peoples. Perez de Cuellar challenged traditional readings of Article 2(7) of the UN Charter, which confirms the principle of noninterference in the internal affairs of nations. He stated in Bordeaux: 'We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over the frontiers of

U.N. Security Council Resolution 688 requiring Iraq to allow access to its country for weapons inspectors and humanitarian organizations is illustrative. Although Iraq initially rejected Security Council Resolution 688,²⁶⁸ the U.N. enjoyed a large measure of success in the implementation of this Resolution and those that followed.²⁶⁹

legal documents.”” Damrosch, BEYOND CONFRONTATION, *supra* note 147, at 118 (citing, Secretary-General’s Address at University of Bordeaux, UN Press Release SG/SM/4560, at 6 (April 24, 1991)).

“In the UN Secretary-General’s annual report to the United Nations in September 1991, Perez de Cuellar wrote of the new balance that must be struck between sovereignty and the protection of human rights: I believe that the protection of human rights has now become one of the keystones in the arch of peace. I am also convinced that it now involves more a concerted exertion of international influence and pressure through timely appeal, admonition, remonstrance or commendation and, in the last resort, and appropriate United Nations presence, than what was regarded as permissible under traditional international law. It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity. The fact that, in diverse situations, the United Nations has not been able to prevent atrocities cannot be cited as an argument, legal or moral, against the necessary corrective action, especially where peace is also threatened . . . We need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights . . . What is involved is not the right of intervention but the collective obligation of States to bring relief and redress in human rights emergencies.” *Id.* at 118-119 (citing, Javier Perez de Cuellar, Report of the Secretary-General on Work of the Organization: 1991, UN Doc A/46/1, at 12-13 (1991)).

“Boutros Boutros-Ghali, Perez de Cuellar’s successor as UN Secretary-General, elaborated on this point during a special session of the Security Council on January 31, 1992: State sovereignty takes a new meaning in this contest. Added to its dimension of rights is the dimension of responsibility, both internal and external. Violation of state sovereignty is and will remain an offense against the global order, but its misuse also may undermine human rights and jeopardize a peaceful global life. Civil wars are no longer civil, and the carnage they inflict will not let the world remain indifferent . . . Nations are too interdependent, national frontiers are too porous, and transnational realities in the spheres of technology and investment on one side and poverty and misery on the other are too dangerous to permit egocentric isolationism.” *Id.* at 119 (citing, Federal News Service Transcript, VM-5-2, 3-4 (Jan. 31, 1992)).

²⁶⁸ After being strong-armed by the U.N. and the U.S. with the threat of armed intervention, Iraq formally agreed to the operation on May 23, 1991.

²⁶⁹ This success was due, in large part, to the continued presence of U.S. military forces and the enforcement of the “no-fly zone” over northern and southern Iraq by coalition forces.²⁶⁹ At the height of the operation, over 21,000 American, British and French troops were deployed to the region. Fink (unpaginated), *supra* note 261.

4. HUMANITARIAN INTERVENTION: LAWS versus JUSTICE

Apart from the problem of overcoming customary notions of absolute state sovereignty,²⁷⁰ the issue remains regarding the proper rationale for armed intervention in response to humanitarian violations. A suggested legal rationale would be to analyze the need for humanitarian intervention in conjunction with the threat to world peace posed by the situation.²⁷¹ For example, internal strife occurring in one nation may flow over national borders. The civil wars in Rwanda and Burundi and in the Balkans are recent illustrations.²⁷² "Common sense and historical experience thus point toward the classification of such large-scale humanitarian crises as presumptive threats to international peace and security."²⁷³

A statement of legal rationale for humanitarian intervention should not end the analysis. The concept of equalizing justice is directly applicable to international situations calling for humanitarian intervention. Specifically, the UN Charter provides provide strong authority for the application of equalizing justice.

Although Charter makes sparse use of the word "justice" and never defines its meaning,²⁷⁴ the notion of equalizing justice appears with frequency in the Preamble and the first

²⁷¹ The "initial inquiry should be whether, in a particular case of humanitarian need, there exists a threat to international peace and security that would invoke the Security Council's jurisdiction to consider collective action." Damrosch, BEYOND CONFRONTATION, *supra* note 147, at 120.

²⁷² "The historical record establishes all too often that massive violations of human rights occur within a country or man-made or natural disasters that initially occur in one state inevitably have an impact on regional or international affairs. These 'internal' events lead to (a) large refugee migrations, (b) internal armed conflicts that ultimately spill over national borders and trigger broader armed conflicts, (c) dangerous pressures on the availability and distribution of regional resources, and/or (d) transnational environmental health problems." *Id.* at 122.

²⁷³ *Id.* at 122.

Article²⁷⁵ of the Charter. As used in the opening section of the Charter, the notion of equalizing justice is focused on the protection of the dignity of the individual person. The Preamble states that equality is one of the primary ends of the Charter: “[T]o reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small”²⁷⁶ This statement defines the essence of equalizing justice. All members of the society are objectively equal regardless of size or power.

Similar to the Preamble, Articles 1(2)²⁷⁷ and 1(3)²⁷⁸ again describe the goal of equalizing justice. These articles articulate the need to establish equality all peoples, regardless of their society or culture.

An appropriate analysis of humanitarian intervention under the Charter requires the recognition that the principles of peaceful settlement of disputes and sovereignty are not absolute.²⁷⁹ Both have limits when viewed in contrast to the human rights violations being

²⁷⁵ Article 1 of the Charter is entitled “Purposes of the United Nations”

²⁷⁶ GOODRICH & HAMBRO, *supra* note 134, at 87. See note ? *supra* for the full text of the Preamble.

²⁷⁷ Article 1(2) states: “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;” *Id.* at 95.

²⁷⁸ Article 1(3) states: “To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;” *Id.* at 96.

²⁷⁹ “On January 31, 1992, the heads of government of the then members of the U.N. Security Council issued an unprecedented declaration intended to strengthen the power of the United Nations to negotiate resolution of conflicts and to respond to situations that imperil humanity. The declaration stated in part: ‘The absence of war and military conflicts amongst states does not insure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole needs to give the highest priority to the solution of these matters.’” Damrosch, Beyond Confrontation, *supra* note 148

committed. More importantly, the UN Charter mandate that justice be applicable in equal measure to all people demands action. This especially true when basic human rights, of both nationals and non-nationals, are brutally violated.

The most appropriate view of the doctrine of humanitarian intervention takes account of the fact that the international society is not yet sufficiently organized to eliminate the need for forcible self help in certain situations. The society of nations had not yet reached Schwarzenberger's ideal of an integrated community requiring little policing. The modern international society requires the prudent, legal and justified application of force situations demand such action. The Chapter allows such action and justice demands it.

The requital of injuries wrongfully inflicted on individuals is no less important than the reparation of harm to nations. Paying strict homage to the prohibition on the use of force among nations while damage is wrongfully inflicted does nothing to bind the society such law is designed to protect. “[A] prohibition of violence is not an absolute virtue . . . it has to be weighed against other values as well.”²⁸⁰ The appropriate application of force in humanitarian interventions finds its basis not only in the law, but in justice.

Figure 5 graphically depicts the addition of humanitarian interventions on the law/justice continuum.

at 122 (citing, Note by the President of the Security Council, G.A. S/23500 (1992), Jan 31, 1992; printed in Security Council Summit Declaration: *New Risks for Stability and Security*, N.Y. TIMES, Feb. 1, 1992, at 1, col. 6).

²⁸⁰ Lillich, *supra* note 247, at 65.

**Figure 5: LAW/JUSTICE CONTINUUM ADDING HUM.
INTERVENTIONS**

Societies-Law of Power	Hybrid-Law of Reciprocity	Community-Law of Co-Ordination Shared values/ethics
Unequal justice/Victor's Justice/No Justice	Equalizing justice <ul style="list-style-type: none"> -juridical -reparative -communicative -corrective (requital) -Just War-proportionality, necessity, charity (civility), volitional justice -Anticipatory Self-Defense-Caroline Factors -Reprisal-Culpability -No Reparation Thru Peaceful Means -Proportional Response -Primary End of Reparation, not Punishment -Humanitarian Intervention-Equality of Individuals, Natural Human Rights 	Distributive justice -subordination to community. Co-ordination btw subjective heinous

IV. JUSTICE AS A COMPONENT OF A NORMATIVE APPROACH TO INTERNATIONAL LAW

The ideological component of the just war doctrine is the notion of justice evolved from Christian theological and philosophical heritage and by common custom. The demise of the just war doctrine was precipitated by the destruction of the theological and philosophical unity that characterized Christendom. With the fall of the Holy Roman Empire after the

Thirty Years' War, the unity of the Christian community was replaced with the absolute sovereignty of nations.

An inherent problem in the notion of absolute state sovereignty is that it places power in the hands of individual nations. This shift of power from the community to states allowed nations to abrogate any external law placed upon them. Thus, “[s]ubsequent to the virtual demise of the just war doctrine, the predominant conviction in the 19th (and early 20th) century was that every State had a right—namely, an interest protected by international law—to embark upon war whenever it pleased.”²⁸¹ Following pragmatic Machiavellian philosophy, “[w]ar came to be characterized as ‘a right inherent in sovereignty itself’. Moreover, the war-making right was thought of as the paramount attribute of sovereignty.”²⁸²

After witnessing the horror of two world wars, the United Nations was formed in an attempt to control the unfettered power wielded by nations. The United Nations Charter, for the first time since the fall of the Holy Roman Empire, established a relatively effective external enforcement mechanism for the law governing nations. The UN Charter places a premium on the maintenance of peace and sovereignty. What is of paramount importance under the Charter is the breach of the established norm of peace. In effect, what the Charter has done is to replace justice—the component of international jurisprudence regarding interstate use of force, with laws that enforce the peace at almost any cost.

²⁸¹ “[A]mong the legitimate reasons for war would figure the desire to use it as a sanction against non-compliance with international law . . . Equally, war could be employed as a means to challenge and upset the international legal *status quo*.” DINSTIEN, *supra*, note 1 at 73 (citing, J.L. Kunz, *The Law of Nations, Static and Dynamic*, 27 AM.J.INT'L L. 630, 634 (1933)).

²⁸² *Id.* at 73 (citing, A.S. HERSHY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW 349 (1912), and, M. Virally, *Panorama du Droit International Contemporain*, 183 R.C.A.D.I. 9, 99 (1983)).

The just war concept of *bellum justum* was replaced by that of *bellum legale*: what is important is the enforcement, through mechanically-applied laws, of peace, not the attainment of justice. The error in this reasoning is that law should not be an end in and of itself, but the means to the greater end of achieving justice. The Naturalist scholars recognized centuries ago that positive rules stipulated in treaties will be dead rules if they deviate from the normative consciousness of the community.²⁸³ In other words, laws must reflect the needs of the society in which they seek to govern if they are to be effective.

It must be understood that effectiveness international jurisprudence is limited by the community it seeks to regulate. The modern international community is characterized by the primacy of power, sovereignty and the pursuit of individual self-preservation.

Schwarzenberger notes that societies which operate under the primacy of power seek laws which stabilize the group. Unlike integrated communities which share ethical and moral convictions and seek laws which have deontological or binding effect. What this means is that international law cannot be viewed under the same lens as more familiar domestic law. The former regulates a very loosely bound group of members, often embracing divergent values, while the latter regulates a fairly integrated society.

The issue that remains is: What is the place of justice in international jurisprudence. As has been noted that the Naturalists' epistemological inquiry into man's need for justice is grounded in each individual's right to liberty, equality, respect for physical and moral integrity.²⁸⁴ These same rights can be analogized to nations. Achievement of these rights can be accomplished through the Aristotelian notion of corrective or equalizing justice.

Equalizing justice requires reparation for injury wrongfully inflicted. Thus, if one man culpably assaults another, the guilty party should be required to make reparations to make the

²⁸³ Yasuaki, A Normative Approach, *supra* note 68, at 8.

injured party whole. Reparation may include punishment to ensure a deterrent affect is achieved.²⁸⁵ Similarly, if one nation wrongly harms another, or if a sovereign wrongfully harms individual persons, equalizing justice requires requital of the harm done.

Applying this notion of equalizing justice to international jurisprudence will have the practical effect of giving validity to the law. Equalizing justice has direct applicability in the area of expanded national self-defense, to include anticipatory self-defense and reprisal, and also in the doctrine of humanitarian intervention.

The oft-cited concern for removing the concept of justice from international jurisprudence is that justice is such a nebulous notion that it is subject to abuse by the powerful.²⁸⁶ This argument fails for two reasons:

First, the argument that the floodgates of power will be opened if justice is reintroduced into international jurisprudence denies any control of the collective world society by the United Nations and reinforces the argument that power alone governs in relations among nations. If this is true, we have made no progress since the establishment of the world community in 1945.

Second, adding a justice component to international jurisprudence should be tempered by the just war concepts of proportionality, discrimination and last resort. These very concepts are embedded in the customary law notion of anticipatory self-defense which was tempered by the Caroline factors of necessity, immediacy and proportionality. Similarly, the just use of reprisal is limited by the expanded-Naulilaa criteria of necessity of a prior wrong, use of force as a last resort, proportionality and the object of reparation, not solely punishment.²⁸⁷

²⁸⁵ This is evident in the fact that Aristotle viewed the main purpose of penal justice as private and reparative in nature. see Del Vecchio, *supra*, note 176, at 219.

Humanitarian interventions for the protection of nationals abroad or for the protection of non-nationals should be permitted an intentional wrong has clearly been committed. This wrong should be gauged against the rights of nation who citizen(s) is/are wronged, or the extent of the wrong committed against foreign citizens.

Restrictivists cling to Article 2(4)'s blanket prohibition against the inter-state use of force as if it were the definitive commandment regulating relations among nations. This view allows for the unilateral use of force by nations only in the very narrow instance of defending against an on-going, or recently completed, attack.

The world is a much more complex place than acknowledged by the restrictivist view of placing a sanction on the first use of first, while condoning the second use. "The moral tradition of just war is a great deal more complex than the first/second use distinction allows; it admits that sometimes there is a justification for a state to make the first use of force in preemptive defense against an enemy who clearly intends an unjust, aggressive military action against it. When the emphasis is put on priority of resort to force, the question of justice, which is a moral priority, is obscured."²⁸⁸

Positivists reject the concept of justice because of its inability to provide clearly discernible, objective criteria mechanically applicable in every case. It is true that what is just in any particular case will depend on the circumstances. It cannot be denied, however, that to strip international jurisprudence of its inherent justice component in the name of establishing objectivity makes a mockery of the law. Natural reason demands that justice and the law go hand-in-hand: "An appeal to Heaven" as Locke called it, "that is, the struggle

²⁸⁸ JOHNSON, JUST WAR TRADITION, *supra* note 4, at 359.

against the written laws in the name of ‘unwritten’, the revindication of natural law against the positive law which denies it.”²⁸⁹

The value in international law of sovereignty, non-intervention and the prohibition on the use of force are readily acknowledged. It is not the intent to jettison these concepts and return to the nineteenth century paradigm of power. It is the intent, however, to recognize the fallacy in point-for-point conformity to a rule with out frequent regard for the principles behind the law.

As Professor O’Brien very aptly notes, the international normative values of sovereignty and non-intervention must be measured against the greater need for justice:

Justice and humanity may in some situations override those values. Injustice and inhumanity may flourish behind the shield of ‘sovereignty’ and ‘non-intervention.’ . . . Given the destructiveness of virtually all modern forms of war there is good reason to give high priority to its avoidance, but that priority is not total and perennial. . . . [T]here are some situations that can only be alleviated by some form of armed intervention and coercion and, in such cases, war-avoidance must yield to other priorities such as justice and protection of human rights.²⁹⁰

The principle behind any lasting system of law must, at the very least, be to seek what it conceives to be justice. Substance should be given to the presently empty platitudes of “justice” that appear in the Preamble and first Article of the UN Charter: For any system of law without justice is bound to be untenable. As Del Vecchio states, “when . . . the rules of the system in force are in irreconcilable conflict with those elementary requirements of

²⁸⁹ Del Vecchio, *supra* note 176, at 158.

²⁹⁰ William V. O’Brien, *Just War Doctrine’s Complementary Role on the International Law of War*, in 67 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 1995: LEGAL AND MORAL CONSTRAINTS ON LOW-INTENSITY CONFLICT 181, 193 (Alberto R. Coll et al. eds., 1995).

justice, which continuously and imperiously reborn in the moral consciousness, are the primary reasons of its validity.”²⁹¹

²⁹¹ Del Vecchio, *supra* note 176, at 158.